Supreme Court, U.S.
FILED
JUL 26 2006
OFFICE OF THE CLERK

(1)

No. 05-8820

IN THE

Supreme Court of the United States

GARY LAWRENCE,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

JOINT APPENDIX

JEFFREY T. GREEN
COURTNEY A. SMITH
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

MARY CATHERINE BONNER *
WANDA RAIFORD
MARY CATHERINE BONNER, PA
207 S.W. 12th Court
Ft. Lauderdale, Florida 33315
(954) 523-6225

Counsel for Petitioner

* Counsel of Record

June 26, 2006

PETITION FOR CERTIORARI FILED JANUARY 23, 2006
CERTIORARI GRANTED MARCH 27, 2006

TABLE OF CONTENTS

	Page
United States District Court, Northern District of Florida, Docket Entries	1
United States Court of Appeals, Eleventh Circuit, Docket Entries	14
Petition for Writ of Habeas Corpus, *Lawrence* v. *Florida*, No. 3:03-cv-00097-RH (N.D. Fl. filed Mar. 11, 2003)	21
Amended Petition for Petition for Writ of Habeas Corpus, *Lawrence* v. *Florida*, No. 3:03-cv-00097-RH (N.D. Fl. filed Sept. 8, 2003)	41
Response to Order to Show Cause by State of Florida, *Lawrence* v. *Florida*, No. 3:03-cv-00097-RH (N.D. Fl. filed Jan. 12, 2004)	55
Reply to Response to Motion to Amend/Correct, *Lawrence* v. *Florida*, No. 3:03-cv-00097-RH (N.D. Fl. filed Mar. 30, 2004)	78
Lawrence v. *Florida*, No. 3:03-cv-00097-RH (N.D. Fl. Apr. 13, 2004) (Order Staying Proceedings)	92
Lawrence v. *Florida*, No. 3:03-cv-00097-RH (N.D. Fl. May 27, 2004) (Order on Status of Stay)	94
Lawrence v. *Florida*, No. 3:03-cv-00097-RH (N.D. Fl. Sept. 16, 2004) (Order for Dismissal)	97
Motion for Certificate of Appealability, *Lawrence* v. *Florida*, No. 3:03-cv-00097-RH (N.D. Fl. filed Nov. 11, 2004)	98
Response in Opposition to Motion for Certificate of Appealability, *Lawrence* v. *Florida*, No. 3:03-cv-00097-RH (N.D. Fl. filed Nov. 12, 2004)	101
Lawrence v. *Florida*, No. 3:03-cv-00097-RH (N.D. Fl. Nov. 15, 2004) (Order Granting Certificate of Appealability)	107
Lawrence v. *Florida*, 421 F.3d 1221 (11th Cir. 2005)	111

U.S. DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA—
District Version 2.5 (Pensacola)

[Filed 03/11/2003]

Civil Docket For Case #: 3:03-cv-00097-RH

GARY LAWRENCE,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
03/11/2003	1	PETITION for writ of habeas corpus; -state habeas 28:2254 (tnc,Pensacola) (Entered: 03/13/2003)
03/11/2003	2	MOTION by petitioner GARY LAWRENCE to Proceed in Forma Pauperis (tnc, Pensacola) (Entered: 03/13/2003)
03/11/2003	3	MOTION by petitioner GARY LAWRENCE with memorandum in support for Appointment of Counsel (tnc,Pensacola) (Entered: 03/13/2003)
03/13/2003		Setting 90 day no activity deadline pursuant to N.D.Fla.Loc.R.41.1 to 6/11/03 (tnc,Pensacola) (Entered: 03/13/2003)

DATE	NO.	PROCEEDINGS
03/13/2003		NOTICE to Pro Se of Case Filing and Pleading Format (tnc,Pensacola) (Entered: 03/13/2003)
03/17/2003		FILE location: mailed to Tallahassee Div. Case assigned to Judge Hinkle (Death Penalty Case). (tnc,Pensacola) (Entered: 03/17/2003)
03/18/2003		File Returned to Court: to Judge Robert L. Hinkle Re: [1-1] petition, [2-1] motion to Proceed in Forma Pauperis by GARY LAWRENCE, [3-1] motion for Appointment of Counsel by GARY LAWRENCE (mbs,Tallahassee) (Entered: 03/18/2003)
03/24/2003	4	MOTION by petitioner GARY LAWRENCE for Appointment of Counsel (lcu,Pensacola) (Entered: 03/25/2003)
03/26/2003	5	LETTER by clerk sent to petitioner of reassignment of Judge. Future pleadings to be forwarded to the Tallahassee Div. (tnc,Pensacola) (Entered: 03/26/2003)
03/26/2003		DOCUMENT Location re: [5-1] letter, [4-1] motion for Appointment of Counsel by GARY LAWRENCE Sent to Tallahassee Div. Reason: to update file (tnc,Pensacola) (Entered: 03/26/2003)
05/09/2003	6	MOTION by GARY LAWRENCE for Appointment of Counsel for representation in to-be-filed federal habeas corpus proceedings in a capital case (als,Tallahassee) (Entered: 05/23/2003)

DATE	NO.	PROCEEDINGS
05/27/2003	7	ORDER by Judge Robert L. Hinkle granting [6-1] motion for Appointment of Counsel * added MARY C BONNER, granting [4-1] motion for Appointment of Counsel, granting [3-1] motion for Appointment of Counsel, granting [2-1] motion to Proceed in Forma Pauperis Setting amended petition deadline for 6/26/03 Copies sent as noted on document. (pll,Tallahassee) (Entered: 05/27/2003)
06/05/2003	8	CJA 30 as to GARY LAWRENCE: Appointment of Mary Catherine Bonner, Attorney Copies sent as noted on document. (Original to CJA attorney) (vjr,Tallahassee) (Entered: 06/05/2003)
06/18/2003		Resetting 90 day no activity deadline pursuant to N.D.Fla.Loc.R.41.1 to 9/16/03 (tnc,Pensacola) (Entered: 06/18/2003)
06/26/2003		File Returned to Court: to Judge Robert L. Hinkle Re: [7-2] order (admin) (Entered: 06/26/2003)
07/09/2003	9	ORDER TO SHOW CAUSE by Judge Robert L. Hinkle directed to GARY LAWRENCE to show cause: for failure to comply with an order of the court or why action should not be dismissed. Show Cause Response due by 8/1/03 - return file to court on 8/1/03. Copies sent as noted on document. (als,Tallahassee) (Entered: 07/10/2003)

DATE	NO.	PROCEEDINGS
07/16/2003	10	RESPONSE by GARY LAWRENCE re: [9-1] order and Request for Extension of time in which to file: (als,Tallahassee) (Entered: 07/18/2003)
07/22/2003	11	ORDER by Judge Robert L. Hinkle resetting amended pleadings deadline for 9/2/03 re: [1-1] petition , resetting deadline to return file to court for 9/3/03 Re: [1-1] petition Copies sent as noted on document. (als,Tallahassee) (Entered: 07/23/2003)
09/03/2003		Deadline updated resetting amended pleadings deadline for 9/10/03 re: amended petition , resetting deadline to return file to court for 9/11/03 Re: amended pleading and/or other filing (per chambers) (als, Tallahassee) (Entered: 09/03/2003)
09/08/2003	12	amended complaint/petition by GARY LAWRENCE amending [1-1] petition (als,Tallahassee) (Entered: 09/12/2003)
09/12/2003	13	MEMORANDUM by GARY LAWRENCE in support of [12-1] amended complaint by GARY LAWRENCE. (als,Tallahassee) (Entered: 09/12/2003)
09/16/2003		File Returned to Court: to Judge Robert L. Hinkle Re: [13-1] support memorandum by GARY LAWRENCE, [12-1] amended complaint by GARY LAWRENCE (als,Tallahassee) (Entered: 09/16/2003)
09/16/2003		resetting 90 day no activity deadline pursuant to N.D.Fla.Loc.R.41.1 to 12/15/03 (als,Tallahassee) (Entered: 09/16/2003)

DATE	NO.	PROCEEDINGS
09/22/2003	14	ORDER by Judge Robert L. Hinkle setting answer deadline for 11/20/03 for STATE OF FLORIDA , setting reply to response for plaintiff to respond to reply for 12/15/03 Copies sent as noted on document. (als,Tallahassee) (Entered: 09/22/2003)
10/27/2003	15	SUPPLEMENTAL MEMORANDUM OF LAW AND FACT by GARY LAWRENCE in support of [13-1] support memorandum by GARY LAWRENCE . (als,Tallahassee) (Entered: 10/27/2003)
11/21/2003	16	MOTION for Extension of Time to File Answer re 12 Amended Complaint by STATE OF FLORIDA. (mbs, Tallahassee) (Entered: 12/01/2003)
11/21/2003	17	NOTICE of Appearance by CASSANDRA KAYE DOLGIN on behalf of STATE OF FLORIDA (mbs, Tallahassee) (Entered: 12/01/2003)
12/03/2003	18	ORDER EXTENDING DEADLINE FOR RESPONSE TO AMENDED PETITION; granting 16 Motion for Extension of Time to Answer . Deadline extended through 1/20/04. clerk to provide respondent's attorney of record, on request and without charge, copies of any orders entered but not previously provided to respondent. Signed by Judge ROBERT L HINKLE. (mbs, Tallahassee) (Entered: 12/03/2003)
12/03/2003		Set Deadlines/Hearings: Responses to amended petition due by 1/20/2004 (mbs, Tallahassee) (Entered: 12/03/2003)

DATE	NO.	PROCEEDINGS
01/12/2004	19	RESPONSE TO ORDER TO SHOW CAUSE by STATE OF FLORIDA. (DOLGIN, CASSANDRA) (Entered: 01/12/2004)
01/12/2004	20	NOTICE by STATE OF FLORIDA re 19 Response to Order to Show Cause *Of Filing Habeas Corpus Checklist* (Attachments: # 1 Respondent's Habeas Corpus Checklist) (DOLGIN, CASSANDRA) (Entered: 01/12/2004)
01/12/2004	21	MOTION to Amend/Correct 20 Notice (Other) *By Interlineation* by STATE OF FLORIDA. (Response due by 1/30/2004) (DOLGIN, CASSANDRA) (Entered: 01/12/2004)
01/20/2004	22	NOTICE of receipt by Clerk's office of checklist and copies of state court records by STATE OF FLORIDA re 20 Notice (Other) (mbs, Tallahassee) (Entered: 01/20/2004)
02/02/2004	23	ORDER ON FILING DATE OF ANSWER, granting 21 Motion to Amend/Correct. Signed by Judge ROBERT L HINKLE. (mbs, Tallahassee) (Entered: 02/02/2004)
02/13/2004	24	MOTION to Extend Time *to File Reply to State's Response* by GARY LAWRENCE. (BONNER, MARY) (Entered: 02/13/2004)
02/25/2004	25	ORDER EXTENDING DEADLINE FOR FILING REPLY; granting 24 Motion to Extend Time through 3/31/04. Signed by Judge ROBERT L HINKLE. (mbs, Tallahassee) (Entered: 02/25/2004)

DATE	NO.	PROCEEDINGS
02/25/2004		Set Deadline for Petitioner's Reply to Respondent's response by 3/31/2004. (mbs, Tallahassee) (Entered: 02/25/2004)
03/30/2004	26	REPLY to Response to Motion re 21 MOTION to Amend/Correct 20 Notice (Other) *By Interlineation Motion in Opposition to the State's Order to show cause Response and Motion for Equitable Relief* filed by GARY LAWRENCE. (BONNER, MARY) (Entered: 03/30/2004)
03/31/2004	27	DOCKET ANNOTATION BY COURT: Re 26 Reply to Response to Motion, filed by GARY LAWRENCE. The Electronic Noticing feature for the Northern District of Florida was not properly functioning on March 29, March 30, and prior to 9:00 AM Central time on March 31. This annotation serves as notice that documents were filed and parties not electronically noticed on those days. Documents should not be refiled. Counsel should govern themselves accordingly. (mbs, Tallahassee) (Entered: 03/31/2004)
04/13/2004	28	ORDER STAYING PROCEEDINGS pending final ruling by the U. S. Supreme Court in Caruso v. Abela, 72 U.S.L.W. 3506 (Jan. 20, 2004) (No. 03-1079). Signed by Judge ROBERT L HINKLE on 4/12/04. (mbs, Tallahassee) (Entered: 04/13/2004)

DATE	NO.	PROCEEDINGS
04/15/2004	29	MOTION to *Vacate In Part Order Dated April 12, 2004 And For Order And Judgment Dismissing Petition As Time-Barred* by STATE OF FLORIDA. (Response due by 5/3/2004) (DOLGIN, CASSANDRA) (Entered: 04/15/2004)
04/21/2004	30	ORDER denying 29 Motion to Vacate . Signed by Judge ROBERT L HINKLE. (mbs, Tallahassee) (Entered: 04/22/2004)
05/05/2004	31	NOTICE OF APPEAL as to 28 Order Staying Case, and 30 Order on Motion to Vacate by STATE OF FLORIDA. (Filing fee $255 Receipt Number 400 103826.) Certificate of Readiness due by 5/30/2004 (mbs, Tallahassee) (Entered: 05/06/2004)
05/06/2004	32	USDC LETTER Transmitting 31 NOTICE OF APPEAL as to 28 Order Staying Case, and 30 Order on Motion to Vacate by STATE OF FLORIDA. (Filing fee $255 Receipt Number 400 103826.) Certificate of Readiness due by 5/30/2004 (mbs, Tallahassee) (mbs, Tallahassee) (Entered: 05/06/2004)
05/20/2004	33	USCA PROCEDURAL LETTER re: 31 NOTICE OF APPEAL as to 28 Order Staying Case, and 30 Order on Motion to Vacate by STATE OF FLORIDA. USCA Appeal # 04-12348-P (mbs, Tallahassee) (Entered: 05/21/2004)

DATE	NO.	PROCEEDINGS
05/27/2004	34	ORDER ON STATUS OF STAY. 28 Order Staying Case remains in effect only as long as 31 Notice of Appeal filed by STATE OF FLORIDA remains pending. When that appeal is resolved, the stay will immediately be vacated and judgment will be entered dismissing petition. Signed by Judge ROBERT L HINKLE on 5/27/04. (mbs, Tallahassee) (Entered: 05/28/2004)
06/10/2004	35	USCA PROCEDURAL LETTER re: 31 NOTICE OF APPEAL USCA Appeal # 04-12348-P (amm, Tallahassee) (Entered: 06/15/2004)
09/07/2004	36	ORDER of USCA as to 31 Notice of Appeal filed by STATE OF FLORIDA - Appellee's motion to strike respondent appellant's initial appellant's brief is denied as moot. (amm, Tallahassee) (Entered: 09/13/2004)
09/07/2004	37	USCA ORDER IN LIEU OF MANDATE as to 31 Notice of Appeal filed by STATE OF FLORIDA (amm, Tallahassee) (Entered: 09/13/2004)
09/13/2004		ACTION REQUIRED BY CHAMBERS: Chambers of Judge Hinkle notified that action is needed Re: 34 Order, 37 USCA Order in Lieu of Mandate (amm, Tallahassee) (Entered: 09/13/2004)
09/14/2004	38	MOTION to Extend Time by GARY LAWRENCE. (BONNER, MARY) (Entered: 09/14/2004)

DATE	NO.	PROCEEDINGS
09/16/2004	39	ORDER FOR DISMISSAL. Clerk to enter jugment denying petition as untimely. 38 MOTION to Extend Time filed by GARY LAWRENCE denied as moot. Motions terminated: 38. Signed by Judge ROBERT L HINKLE on 9/16/04. (mbs, Tallahassee) (Entered: 09/20/2004)
09/20/2004	40	JUDGMENT denying petition for writ of habeas corpus as untimely (mbs, Tallahassee) (Entered: 09/20/2004)
10/15/2004	41	NOTICE OF APPEAL as to 39 Order, Terminate Motions, 40 Judgment by GARY LAWRENCE. (Filing fee $255 - Fee not paid) (BONNER, MARY) Modified on 10/19/2004 (amm, Tallahassee). (Entered: 10/15/2004)
10/19/2004	42	Transmission of Notice of Appeal and Docket Sheet to US Court of Appeals re 41 Notice of Appeal (amm, Tallahassee) (Entered: 10/19/2004)
10/25/2004	43	USCA Case Number 04-15435P for 41 NOTICE OF APPEAL as to 39 Order, Terminate Motions, 40 Judgment by GARY LAWRENCE. (Filing fee $255 - Fee not paid) (BONNER, MARY) Modified on 10/19/2004 (amm, Tallahassee). filed by GARY LAWRENCE. (amm, Tallahassee) (Entered: 10/27/2004)
11/01/2004	44	USCA PROCEDURAL LETTER re: 41 NOTICE OF APPEAL. USCA Appeal # 04-15435-P (amm, Tallahassee) (Entered: 11/04/2004)

DATE	NO.	PROCEEDINGS
11/04/2004		ACTION REQUIRED BY CHAMBERS: Chambers of Judge Hinkle notified that action is needed Re: 44 USCA Procedural Letter - COA needed (amm, Tallahassee) (Entered: 11/04/2004)
11/11/2004	45	MOTION for Certificate of Appealability by GARY LAWRENCE. (BONNER, MARY) (Entered: 11/11/2004)
11/11/2004	46	MOTION to Appoint Counsel by GARY LAWRENCE. (BONNER, MARY) (Entered: 11/11/2004)
11/11/2004	47	MOTION for Leave to Appeal in forma pauperis by GARY LAWRENCE. (BONNER, MARY) (Entered: 11/11/2004)
11/12/2004	48	RESPONSE in Opposition re 45 MOTION for Certificate of Appealability filed by STATE OF FLORIDA. (DOLGIN, CASSANDRA) (Entered: 11/12/2004)
11/15/2004	49	ORDER GRANTING CERTIFICATE OF APPEALABILITY - Petitioner's notice of appeal (doc 10) treated as a certificate of appealability and re 45 MOTION for Certificate of Appealability filed by GARY LAWRENCE are granted; 46 MOTION to Appoint Counsel filed by GARY LAWRENCE, 47 MOTION for Leave to Appeal in forma pauperis filed by GARY LAWRENCE are granted. Signed by Judge ROBERT L HINKLE on 11/15/04. (amm, Tallahassee) (Entered: 11/15/2004)

DATE	NO.	PROCEEDINGS
11/24/2004	50	USCA PROCEDURAL LETTER re: 41 NOTICE OF APPEAL as to 39 Order, Terminate Motions, 40 Judgment by GARY LAWRENCE. (Filing fee $255 - Fee not paid) (BONNER, MARY) Modified on 10/19/2004 (amm, Tallahassee). USCA Appeal # 04-15435-P (amm, Tallahassee) (Entered: 12/07/2004)
11/24/2004	51	USCA PROCEDURAL LETTER re: 41 NOTICE OF APPEAL as to 39 Order, Terminate Motions, 40 Judgment by GARY LAWRENCE. (Filing fee $255 - Fee not paid) (BONNER, MARY) Modified on 10/19/2004 (amm, Tallahassee). USCA Appeal # 04-15435-P (amm, Tallahassee) (Entered: 12/07/2004)
12/27/2004	52	ORDER of USCA as to 41 Notice of Appeal filed by GARY LAWRENCE, (amm, Tallahassee) (Entered: 01/05/2005)
02/23/2005	53	Appeal Remark re 41 Notice of Appeal: USCA request for Record on Appeal and Exhibits (amm, Tallahassee) (Entered: 02/24/2005)
02/28/2005	54	Certified and Transmitted Record on Appeal to US Court of Appeals re 41 Notice of Appeal (amm, Tallahassee) (Entered: 02/28/2005)
03/03/2005	55	Certified and Transmitted AMENDED Record on Appeal to US Court of Appeals re 41 Notice of Appeal (3 vol of exhibits forwarded to USCA) (amm, Tallahassee) (Entered: 03/03/2005)

DATE	NO.	PROCEEDINGS
03/07/2005	56	ORDER of USCA as to 41 Notice of Appeal filed by GARY LAWRENCE, (amm, Tallahassee) (Entered: 03/09/2005)
03/07/2005	57	USCA Acknowledgement 54 Appeal Record Sent to USCA USCA Appeal # 04-154350P (amm, Tallahassee) (Entered: 03/09/2005)
03/08/2005	58	USCA Acknowledgement 55 Appeal Record Sent to USCA USCA Appeal # 04-15435-P (amm, Tallahassee) (Entered: 03/14/2005)
08/31/2005	59	USCA ORDER as to 41 Notice of Appeal filed by GARY LAWRENCE (amm, Tallahassee) (Entered: 09/01/2005)
10/03/2005	60	Appeal Record Returned: 31 Notice of Appeal, 41 Notice of Appeal (amm, Tallahassee) (Entered: 10/07/2005)
10/03/2005	61	USCA ORDER IN LIEU OF MANDATE as to 31 Notice of Appeal filed by STATE OF FLORIDA, 41 Notice of Appeal filed by GARY LAWRENCE, (amm, Tallahassee) (Entered: 10/07/2005)

U.S. COURT OF APPEALS
11TH CIRCUIT—ATLANTA

[Docket Date 05/10/04]

Docket #: 04-12348-P

GARY LAWRENCE,
Petitioner-Appellee,

v.

STATE OF FLORIDA,
Respondent-Appellant.

DOCKET ENTRIES

DATE	DATE 2	PROCEEDINGS
05/12/04	/ /	Appearance Form Not Needed for Court Appointment by District Court for Lawrence, Gary Party: Bonner, Mary Catherine
05/18/04	5/18/04	JUR-1 (Letter enclosing jurisdictional question) Issued. c:Bonner, Mary Catherine; c:Dolgin, Cassandra Kaye; c:William McCool
05/18/04	/ /	Jurisdictional Questions Issued
05/26/04	/ /	Appearance Form Submitted. Party: Dolgin, Cassandra Kaye
05/28/04	/ /	Apt Response to Jurisdictional Question: (Atty: Cassandra Kaye Dolgin (#42804-019)) Party: Attorney General of Florida
06/01/04	/ /	Apt Supplemental Response to Jurisdictional Question: (Atty: Cassandra Kaye Dolgin (#42804-019)) Party: Attorney General of Florida

DATE	DATE 2	PROCEEDINGS
06/09/04	05/10/04	Briefing Notice Issued
06/09/04	06/09/04	BR1CIV (Letter confirming brief due date) issued. c:Bonner, Mary Catherine; c:Dolgin, Cassandra Kaye; c:William McCool
06/15/04	/ /	E-Brief Tendered: Appellant by Cassandra Kaye Dolgin (#42804-019) for State of Florida. Party: Attorney General of Florida
06/17/04	06/15/04	Appellant Brief Filed: (Atty: Cassandra Kaye Dolgin (#42804-019)). Party: Attorney General of Florida
06/17/04	06/15/04	Record Excerpts: (Atty: Cassandra Kaye Dolgin (#42804-019)). Party: Attorney General of Florida
07/16/04	07/15/04	Motion to Strike Respondent Appellant's Initial Appellant's Brief: (Atty: Mary Catherine Bonner). Party: Lawrence, Gary
07/22/04	/ /	Response In Opposition to Motion to Strike Respondent Appelaint's Initial Appellant's Brief: (Atty: Cassandra Kaye Dolgin (#42804-019)). Party: Attorney General of Florida
09/02/04	/ /	Appellee's Motion to Strike Respondent Appellant's Initial Appellant's Brief Is DENIED AS MOOT.JFD(j)
09/02/04	/ /	Case Closed. Dismissed-Order
09/02/04	09/02/04	DIS-4 (Letter to district court enclosing court order) Issued. To:William McCool; c:Bonner, Mary Catherine; c:Dolgin, Cassandra Kaye

DATE	DATE 2	PROCEEDINGS
09/02/04	09/02/04	MOT2 (Notice of court action) Issued. c:Bonner, Mary Catherine; c:Dolgin, Cassandra Kaye; c:William McCool
09/02/04	/ /	Appeal is DISMISSED for lack of jurisdiction. JFD/SAB/EEC

U.S. COURT OF APPEALS
11TH CIRCUIT—ATLANTA

[Docket Date 05/10/04]

Docket #: 04-15435-P

GARY LAWRENCE,
Petitioner-Appellant,

v.

STATE OF FLORIDA,
Respondent-Appellee.

DOCKET ENTRIES

DATE	DATE 2	PROCEEDINGS
10/22/04	/ /	Appearance Form Not Needed for Court Appointment by District Court for Lawrence, Gary. Party: Bonner, Mary Catherine
10/25/04	/ /	Probable Jurisdiction Noted
10/27/04	10/27/04	HAB-1 (Docketing Notice) issued. To:Bonner, Mary Catherine; c:Dolgin, Cassandra Kaye; c:William McCool
11/22/04	/ /	CJA-20 Voucher issued (GARY LAWRENCE)
11/22/04	11/15/04	Briefing Notice issued
11/22/04	11/22/04	BR1CIV (Letter confirming brief due date) issued. c:Bonner, Mary Catherine; c:Dolgin, Cassandra Kaye; c:William McCool
11/22/04	11/22/04	CJA1 (CJA appointment of counsel letter) issued. To:Bonner, Mary Catherine; c:William McCool

DATE	DATE 2	PROCEEDINGS
11/22/04	11/15/04	DC Order: IFP, COA & Appointment of Counsel Granted: (Atty: Mary Catherine Bonner). Party: Lawrence, Gary
11/22/04	/ /	CJA-30 Voucher Issued - Mary Catherine Bonner
12/09/04	/ /	Appearance Form Submitted. Party: Dolgin, Cassandra Kaye
12/16/04	/ /	Motion for Extension to File Appellant Brief: (Atty: Mary Catherine Bonner). Party: Lawrence, Gary
12/17/04	/ /	Appellant's motion for extension of time to file the initial brief and records excerpts of appellant to and including January 26, 2005 is GRANTED.JFD(j)
12/17/04	12/16/04	MOT2 (Notice of court action) issued. c:Bonner, Mary Catherine; c:Dolgin, Cassandra Kaye; c:William McCool
01/27/05	/ /	E-Brief Tendered: Appellant by Mary Catherine Bonner for Gary Lawrence (039763). Party: Lawrence, Gary
01/31/05	01/26/05	Appellant Brief Filed: (Atty: Mary Catherine Bonner). Party: Lawrence, Gary
01/31/05	01/26/05	Record Excerpts: (Atty: Mary Catherine Bonner). Party: Lawrence, Gary
02/22/05	/ /	E-Brief Tendered: Appellee by Cassandra Kaye Dolgin for State of Florida. Party: State of Florida
02/23/05	02/22/05	Appellee Brief Filed: (Atty: Cassandra Kaye Dolgin). Party: State of Florida

DATE	DATE 2	PROCEEDINGS
02/28/05	/ /	Motion Requesting Leave to File Appellee's Record Excerpts: (Atty: Cassandra Kaye Dolgin). Party: State of Florida,
03/01/05	/ /	Record on Appeal
03/04/05	/ /	Appellee's motion requesting leave to file "Respondent's Record Excerpts" is GRANTED. JFD(j)
03/04/05	3/04/05	MOT2 (Notice of court action) issued. c:Bonner, Mary Catherine; c:Dolgin, Cassandra Kaye; c:William McCool
03/04/05	/ /	Exhibits - 3 Folders In One (1) Box
03/14/05	03/10/05	Reply Brief Flied: (Atty: Mary Catherine Bonner). Party: Lawrence, Gary
03/18/05	/ /	E-Brief Tendered: Reply by Mary Catherine Bonner for Gary Lawrence (039763). Party: Lawrence, Gary
06/30/05	/ /	Mary Catherine Bonner argued for Appellant; Cassandra Kaye Dolgin argued for Appellee
06/30/05	/ /	Oral Argument Scheduled: Special Panel: 06/30/05
07/11/05	/ /	Supplemental Authority for Appellee: (Atty: Cassandra Kaye Dolgin). Party: State of Florida
08/26/05	/ /	Judgment Entered
08/26/05	08/26/05	OPIN1 (Notice of Issuance of opinion) issued. c:Bonner, Mary Catherine; c:Dolgin, Cassandra Kaye; C:William McCool
08/26/05	/ /	Opinion Issued

DATE	DATE 2	PROCEEDINGS
09/16/05	09/15/05	Motion to Stay Mandate: (Atty: Mary Catherine Bonner). Party: Lawrence, Gary
09/19/05	/ /	Response to Motion to Stay Issuance of Mandate Pending Certiorari Review: (Atty: Cassandra Kaye Dolgin). Party: State of Florida
09/30/05	/ /	The motion of appellant, Gary Lawrence, for stay of the issuance of the mandate pending petition for writ of certiorari is DENIED.JFD(j)
09/30/05	09/29/05	MDT1 (Letter issuing mandate) issued. To:William McCool; c:Bonner, Mary Catherine; c:Dolgin, Cassandra Kaye
09/30/05	/ /	Record and Exhibits Returned to District Court -1 Vol. ROA & 3 Fldrs. Exhibits
09/30/05	/ /	Mandate Issued
09/30/05	/ /	CASE CLOSED
12/14/05	01/23/06	Ext. for Filing Certiorari Granted: (Atty: Mary Catherine Bonner). Party: Lawrence, Gary
01/31/06	01/23/06	Notice of Filing Certiorari-Case No. 05-8820: (Atty: Mary Catherine Bonner). Party: Lawrence, Gary
04/05/06	03/27/06	Certiorari Granted: (05-8820) (Atty: Mary Catherine Bonner). Party: Lawrence, Gary

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA

PETITION UNDER 28 U.S.C. § 2254 BY A PERSON
IN CUSTODY PURSUANT TO A STATE COURT JUDGMENT

UNITED STATES DISTRICT COURT	Division: 3:03cv97/LAC/MCR	
Name of Petitioner: GARY LAWRENCE	Prisoner No.	Case No. (to be assigned by Clerk):

Place of Confinement (include address): UNION CORRECTIONAL INSTITUTE
P.O. BOX 221, RAIFORD, FLORIDA 32083

NAME OF PETITIONER (include aliases): GARY LAWRENCE
v.
NAME OF RESPONDENT (authorized person having custody of petitioner): STATE OF FLORIDA

ATTORNEY GENERAL OF THE STATE OF: (State in which challenged judgment was entered) FLORIDA

PETITION

1. Name and location (circuit and county) of court which entered the judgment of conviction/sentence under attack: CIRCUIT COURT, 1ST JUDICIAL CIRCUIT SANTA ROSA COUNTY, MILTON, FLORIDA

2. Date of judgment (conviction/sentence): MAY 5, 1995

3. Length of sentence: DEATH

4. Nature of offense involved (all counts): 1.) MURDER -1°; 2.) CONSPIRACY TO COMMIT MURDER; 3.) ROBBERY; 4.) GRAND THEFT

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21

5. What was your plea? (Check one)
(a) Not Guilty [X]
(b) Guilty [ ]
(c) Nolo contendere [ ]

If you entered a guilty plea to one count or indictment, and not a guilty plea to another count or indictment, give details: N/A

6. If you pleaded not guilty, what kind of trial did you have? (Check one)
(a) Jury [X]
(b) Judge only [ ]

7. Did you testify at the trial?
Yes [ ] No [X]

8. Did you appeal from the judgment of conviction?
Yes [X] No [ ]

9. If you did appeal, answer the following:

(a) Name of Court: FLORIDA SUPREME COURT

(b) Result: CONVICTION AFFIRMED - DEATH PENALTY

(c) Date of opinion and mandate (include So.2d citation, if known): AUGUST 29, 1997 - 698 So.2d 1219 (1997)

(d) Did you file a petition for rehearing?
Yes [ ] No [X]
If yes, give the result and date of the result: N/A

22

(e) Did you file petition for writ of certiorari?
Yes ☒ No ☐
If yes, give the result and date of the result: CERTIORARI DENIED
522 US 1080, 118 S.Ct. 863, 139 L.Ed 2d 761 _ 1/20/1998

10. Other than the direct appeal, have you previously filed any petitions, applications, or motions with respect to this judgment in state court?
Yes ☒ No ☐

11. If your answer to 10 was "yes," give the following information:

(a) (1) Name of court: CIRCUIT COURT, 1st JUDICIAL CIRCUIT
SANTA ROSA COUNTY, MILTON, FLORIDA

(2) Date filed: APRIL 22, 1999

(3) Nature of proceeding (Fla.R.Crim.P. 3.850, habeas corpus, etc.):
MOTION POST CONVICTION 3.850 Fla. R. Crim. Procedure
PETITION HABEAS CORPUS (Ineffective Assistance of Appellate Counsel)

(4) Grounds raised: SEE ATTACHED EXHIBIT A

EXHIBIT A

GROUND ONE
DENIAL OF EFFECTIVE ASSISTANCE OF COUNSEL

SUPPORTING FACTS (11 (a)(4))

1. Counsel admitted guilt in his opening and closing argument. Counsel conceded guilt throughout the trial as to lesser-included offenses without consent or advice from Defendant. Defendant, a person with limited intellectual grasp, did not understand and was not advised that counsel would concede to guilt to second degree murder or manslaughter in his opening and closing argument. Counsel conceded guilt to first-degree murder in the penalty phase. That said argument took from the jury the effective chance to consider anything but first-degree murder.

2. Defendant's counsel did not sufficiently prepare for the guilt or penalty phase of the trial and presented inadequate evidence on Defendant's mental deficiency and long standing use of intoxicants and drugs. The defense of intoxication was ineffectively presented.

Defendant's counsel further failed to establish his excessive use of intoxicants at the time of the homicide and failed in getting testimony or records of nurse, Carl Ann Thomas presented to the jury as to his use of intoxicants. This evidence was critical to the intoxication defense and counsel should have correctly pursued its admission or proved up the amount of intoxicants through other witnesses or defendant's own testimony.

3. Defense counsel failed to adequately prepare for trial for failure to advise defendant of his right to testify at the trial (guilt phase or penalty phase) so that the jury was unaware of the extent of his alcohol and drug abuse both long standing and at the time of the offense.

Failure to raise or explore Fetal Alcohol Syndrome manifestations of defendant. Defendant was raised in an alcoholic family, particularly his mother during pregnancy. Defendant shows signs of Fetal Alcohol Syndrome which should have been explored and documented. Said Fetal Alcohol Syndrome causes irreparable brain damage and side effects which are consistent with defendant's conduct while intoxicated.

4. Defendant's counsel was inadequate for failure to pursue or utilize adequate expert testimony in the guilt or penalty phase of his trial as to defendant's impairment from intoxicants or drugs.

5. Defendant's counsel failed to object to or preclude felony murder evidence of a robbery wherein the State did not have sufficient evidence to argue felony murder in its opening statement. This caused failure to properly apprize the jury that the robbery aspect of felony murder was not proven. Defense counsel failed to secure appropriate or adequate instructions to the jury that said felony-murder (robbery) was not established.

6. Defendant's counsel failed to pursue or present adequate evidence of Defendant's extreme or emotional disturbance. Except for psychologist, James Larson, Jr. and psychiatrist, Dr. Galloway, defendant's attorney did not attempt to present any witnesses or other evidence of defendant's mental or emotional disturbance.

That said experts failed to establish Defendant's severe inadequacy both with respect to waiver if [sic] his constitutional rights (Motion to Suppress) and level of alcohol impairment as to guilt and penalty phases.

7. Defendant's counsel failed to object or move for a mistrial as to the State's argument in the penalty phase which sought to impugn or minimize and shift the burden of proof as to his defense of intoxication and mental impairment, to

wit: Assistant State Attorney, Mr. Molchan state [sic] in penalty argument:

> "An aggravating circumstance, ladies and gentlemen, that is proven beyond a reasonable doubt. Again we can talk about the psychological testimony that went on and on with respect to this case but the bottom line is regardless of the psychological evidence and that type of stuff Gary Lawrence, beyond any reasonable doubt was committing a crime while under a sentence of imprisonment. Colleen Poole basically said all that needs to be done if he violates or does anything is an administrative parole. He was under a sentence of incarceration in the state penitentiary."

8. That defendant's counsel was inadequately prepared for a death penalty phase, as he was not assisted by death penalty counsel. Failure of defendant's counsel to have or appoint separate counsel for a death penalty case violates due process, Section 9, Florida Court, and V, XIV Amendments to the U.S. Constitution.

9. Defendant's counsel was ineffective and incorrect in his death penalty phase argument wherein he told the jury:

> "We have never at any time in this case disputed Gary Lawrence's guilt, and we have never at any time in this case disputed the fact or we have never suggested to you that Chris Wetheree should be held to the same degree of accountability as Gary Lawrence. We have never told you that."

10. Defendant's counsel was inadequate in failing to move for a mistrial as to hearsay evidence offered to support a robbery theory of felony murder. (Transcript P234-236). Argument or evidence of an alleged robbery of the victim necessarily infected the trial jury and failure to request a mistrial or curative instruction rendered defendant's counsel performance deficient. Likewise, the inclusion of a robbery

argument by the State without a subsequent limiting instruction to the jury denied defendant due process under Article I, Section 9, of the Florida Constitution, and both the Fifth and Fourteenth Amendments to the United States Constitution.

11. Counsel's failure to object, move for mistrial or failure to raise these issues on appeal to the Florida Supreme Court constitute ineffective assistance of trial and appeal counsel. To the extent these issues involve ineffective appellate counsel, Defendant prays this court treat this Motion as a petition for Writ of Habeas Corpus.

12. Defendant's appellate counsel failed to raise any issues as to the guilt phase on appeal, although trail counsel properly preserved the same or such errors were fundamental. To the extent appellate counsel was ineffective, defendant prays this Court treat this issue as a Petition for Writ of Habeas Corpus. Thus, the Florida Supreme Court was limited t [sic] review of the death penalty issues only. Issues not raised on appeal, *inter alia*, were Motion to Suppress Statements and Motion to declare death penalty unconstitutional.

13. State's counsel argued repeatedly during closing argument in the guilt phase that evidence was "uncontroverted". Defense counsel failed to object or move for mistrial as defendant did not testify and the argument was a prejudicial comment on his failure to testify. Furthermore, said comment was a burden shifting argument that inferred defendant was required to controvert an issue or evidence. It also amounted to an expression if [sic] prosecutor's personal opinion as opposed to legal argument. Said argument violated defendant's due process rights under Section 9, Florida Constitution and V and XIV Amendments U.S. Constitution.

14. Defendant's trial counsel waived search and seizure issues at trial after initially preserving them by pre-trial Motion to Suppress. Defense counsel thereafter did not reassert the issues and accordingly waived their inclusion for appellate review.

GROUND TWO
DENIAL OF RIGHT TO IMPARTIAL JURY DUE PROCESS VIOLATION

Defendant was denied access to an impartial jury required by the Fifth and Fourteen Amendment to the United States Constitution and Article I, Sections 9 and 16 of the Florida Constitution. Defendant's venire was called from a list of voters from Santa Rosa County as opposed to the current process of selecting jurors from drivers license list selection of jurors from voter lists amounts to a constitutional violative blue ribbon jury process in violation of both the United States and Florida Constitutions.

GROUND THREE

Florida's capital sentencing statue is unconstitutional on its face and as applied in this case because it fails to prevent the arbitrary and capricious imposition of the death penalty, and it violates the constitutional guarantees of due process and prohibiting cruel and unusual punishment.

Florida's capital sentencing scheme denies Mr. Lawrence's right to due process of law, and constitutes cruel and unusual punishment on its face and as applied in this case. Florida's death penalty statute is constitutional only to the extent that it prevents arbitrary imposition of the death penalty and narrow application of the penalty to the worst offenders. The Florida death penalty statute, however, fails to meet these constitutional guarantees, and therefore violates the Fifth and Eighth Amendment to the United States Constitution.

(5) Did you receive an evidentiary hearing on your petition, application or motion?
Yes ☒ No ☐

(6) Result: 3.850 DENIED

(7) Date of result: October 11, 2000

(b) Did you appeal the result?
Yes ☒ No ☐

If yes, give the result and date of the opinion and mandate (include So.2d citation, if known): ___So. 2d ___, 2002 W.L. 31317967, 27 Fl.W. S877, SC00-2290, SC01-674

(c) If you did not appeal the result, explain briefly why you did not:

N/A

12. Did you file any other petitions or motions in state court aside from those described above?
Yes ☐ No ☒

If yes, set forth on a separate sheet of paper the same information (as requested in 11(a)-(c)) as to the other petitions or motions.

13. Have you previously filed a § 2254 petition, or other pleading regarding the validity of your state court confinement, in any federal court?
Yes ☒ No ☐

If yes, provide the name of the court, case number, and result (including the result of any appeal):

U.S. SUPREME COURT CERTIORARI, INFO PENDING

Petitioner has a pending Petition for Writ of Certiorari in the U.S. Supreme Court. It has been calculated that his time for filing federal habeas corpus would expire one day after denial of certiorari. Thus, he would have insufficient time to file for federal habeas corpus. Petitioner requests ruling herein be deferred until such time as U.S. Certiorar is determined.

14. In the spaces below, set forth all grounds on which you claim that you are being held in violation of the Constitution, laws or treaties of the United States. You must provide a summary of specific facts in support of each ground raised. Even if you file a separate memorandum of law, the facts must be set forth on this petition form. If necessary, you may attach pages setting forth additional grounds and supporting facts.

Caution: If you fail to set forth all grounds in this petition, you may be barred from presenting additional grounds at a later date.

A. Ground one: DENIAL OF EFFECTIVE ASSISTANCE OF COUNSEL

Supporting FACTS (state *briefly* without citing cases or law):

SEE ATTACHED - (GROUND ONE - SUPPORTING FACT (14-A))

Did you raise this claim in state court by direct appeal, 3.850 motion, or otherwise?

30

GROUND ONE

DENIAL OF EFFECTIVE ASSISTANCE OF COUNSEL SUPPORTING FACTS (14–A)

1. Counsel admitted guilt in his opening and closing argument. Counsel conceded guilt throughout the trial as to lesser-included offenses without consent or advice from Defendant. Defendant, a person with limited intellectual grasp, did not understand and was not advised that counsel would concede to guilt to second degree murder or manslaughter in his opening and closing argument. Counsel conceded guilt to first-degree murder in the penalty phase. That said argument took from the jury the effective chance to consider anything but first-degree murder.

2. Defendant's counsel did not sufficiently prepare for the guilt or penalty phase of the trial and presented inadequate evidence on Defendant's mental deficiency and long standing use of intoxicants and drugs. The defense of intoxication was ineffectively presented.

Defendant's counsel further failed to establish his excessive use of intoxicants at the time of the homicide and failed in getting testimony or records of nurse, Carl Ann Thomas presented to the jury as to his use of intoxicants. This evidence was critical to the intoxication defense and counsel should have correctly pursued its admission or proved up the amount of intoxicants through other witnesses or defendant's own testimony.

3. Defense counsel failed to adequately prepare for trial for failure to advise defendant of his right to testify at the trial (guilt phase or penalty phase) so that the jury was unaware of the extent of his alcohol and drug abuse both long standing and at the time of the offense.

Failure to raise or explore Fetal Alcohol Syndrome manifestations of defendant. Defendant was raised in an alcoholic family, particularly his mother during pregnancy. Defendant

shows signs of Fetal Alcohol Syndrome which should have been explored and documented. Said Fetal Alcohol Syndrome causes irreparable brain damage and side effects which are consistent with defendant's conduct while intoxicated.

4. Defendant's counsel was inadequate for failure to pursue or utilize adequate expert testimony in the guilt or penalty phase of his trial as to defendant's impairment from intoxicants or drugs.

5. Defendant's counsel failed to object to or preclude felony murder evidence of a robbery wherein the State did not have sufficient evidence to argue felony murder in its opening statement. This caused failure to properly apprize the jury that the robbery aspect of felony murder was not proven. Defense counsel failed to secure appropriate or adequate instructions to the jury that said felony-murder (robbery) was not established.

6. Defendant's counsel failed to pursue or present adequate evidence of Defendant's extreme or emotional disturbance. Except for psychologist, James Larson, Jr. and psychiatrist, Dr. Galloway, defendant's attorney did not attempt to present any witnesses or other evidence of defendant's mental or emotional disturbance.

That said experts failed to establish Defendant's severe inadequacy both with respect to waiver if [sic] his constitutional rights (Motion to Suppress) and level of alcohol impairment as to guilt and penalty phases.

7. Defendant's counsel failed to object or move for a mistrial as to the State's argument in the penalty phase which sought to impugn or minimize and shift the burden of proof as to his defense of intoxication and mental impairment, to wit: Assistant State Attorney, Mr. Molchan state [sic] in penalty argument:

> "An aggravating circumstance, ladies and gentlemen, that is proven beyond a reasonable doubt. Again we can

> talk about the psychological testimony that went on and on with respect to this case but the bottom line is regardless of the psychological evidence and that type of stuff Gary Lawrence, beyond any reasonable doubt was committing a crime while under a sentence of imprisonment. Colleen Poole basically said all that needs to be done if he violates or does anything is an administrative parole. He was under a sentence of incarceration in the state penitentiary."

8. That defendant's counsel was inadequately prepared for a death penalty phase, as he was not assisted by death penalty counsel. Failure of defendant's counsel to have or appoint separate counsel for a death penalty case violates due process, Section 9, Florida court, and V, XIV Amendments to the U.S. Constitution.

9. Defendant's counsel was ineffective and incorrect in his death penalty phase argument wherein he told the jury:

> "We have never at any time in this case disputed Gary Lawrence's guilt, and we have never at any time in this case disputed the fact or we have never suggested to you that Chris Wetheree should be held to the same degree of accountability as Gary Lawrence. We have never told you that."

10. Defendant's counsel was inadequate in failing to move for a mistrial as to hearsay evidence offered to support a robbery theory of felony murder. (Transcript P234-236). Argument or evidence of an alleged robbery of the victim necessarily infected the trial jury and failure to request a mistrial or curative instruction rendered defendant's counsel performance deficient. Likewise, the inclusion of a robbery argument by the State without a subsequent limiting instruction to the jury denied defendant due process under Article I, Section 9, of the Florida Constitution, and both the Fifth and Fourteenth Amendments to the United States Constitution.

11. Counsel's failure to object, move for mistrial or failure to raise these issues on appeal to the Florida Supreme Court constitute ineffective assistance of trial and appeal counsel. To the extent these issues involve ineffective appellate counsel, Defendant prays this court treat this Motion as a petition for Writ of Habeas Corpus.

12. Defendant's appellate counsel failed to raise any issues as to the guilt phase on appeal, although trail counsel properly preserved the same or such errors were fundamental. To the extent appellate counsel was ineffective, defendant prays this Court treat this issue as a Petition for Writ of Habeas Corpus. Thus, the Florida Supreme Court was limited t [sic] review of the death penalty issues only. Issues not raised on appeal, *inter alia*, were Motion to Suppress Statements and Motion to declare death penalty unconstitutional.

13. State's counsel argued repeatedly during closing argument in the guilt phase that evidence was "uncontroverted". Defense counsel failed to object or move for mistrial as defendant did not testify and the argument was a prejudicial comment on his failure to testify. Furthermore, said comment was a burden shifting argument that inferred defendant was required to controvert an issue or evidence. It also amounted to an expression if [sic] prosecutor's personal opinion as opposed to legal argument. Said argument violated defendant's due process rights under Section 9, Florida Constitution and V and XIV Amendments U.S. Constitution.

14. Defendant's trial counsel waived search and seizure issues at trial after initially preserving them by pre-trial Motion to Suppress. Defense counsel thereafter did not reassert the issues and accordingly waived their inclusion for appellate review.

Yes ☒ No ☐
If yes, explain how it was raised; if no explain why it was not raised:
RAISED IN STATE 3.850

B. Ground two: DENIAL OF RIGHT TO IMPARTIAL JURY DUE PROCESS VIOLATION

Supporting FACTS (state *briefly* without citing cases or law):

Defendant was denied access to an impartial jury required by the Fifth and Fourteenth Amendment to the United States Constitution and Article I, Sections 9 and 16 of the Florida Constitution. Defendant's venire was called from a list of voters from Santa Rosa County as opposed to the current process of selecting jurors from drivers license list selection of jurors from voter lists amounts to a constitutional violative blue ribbon process in violation of both the United States and Florida Constitutions.

Did you raise this claim in state court by direct appeal, 3.850 motion, or otherwise?
Yes ☒ No ☐
If yes, explain how it was raised; if no explain why it was not raised:
Raised in State Court 3.850

C. Ground three: SEE ATTACHED - GROUND 3

Supporting FACTS (state briefly without citing cases or law):

Did you raise this claim in state court by direct appeal, 3.850 motion, or otherwise?

Yes ☒ No ☐

If yes, explain how it was raised; if no explain why it was not raised:

3.850 Motion for Post Conviction

D. Ground four:

GROUND THREE

Florida's capital sentencing statue is unconstitutional on its face and as applied in this case because it fails to prevent the arbitrary and capricious imposition of the death penalty, and it violates the constitutional guarantees of due process and prohibiting cruel and unusual punishment.

Florida's capital sentencing scheme denies Mr. Lawrence's right to due process of law, and constitutes cruel and unusual punishment on its face and as applied in this case. Florida's death penalty statute is constitutional only to the extent that it prevents arbitrary imposition of the death penalty and narrow application of the penalty to the worst offenders. The Florida death penalty statute, however, fails to meet these constitutional guarantees, and therefore violates the Fifth and Eighth Amendment to the United States Constitution.

Supporting FACTS (state *briefly* without citing cases or law):

Did you raise this claim in state court by direct appeal, 3.850 motion, or otherwise?

Yes ☐ No ☐

If yes, explain how it was raised; if no explain why it was not raised:

E. Set forth additional grounds, if any, on separate sheets of paper.

15. What relief do you seek from this Court if your § 2254 petition is granted? NEW TRIAL (RESENTENCING)

Wherefore, petitioner prays that the Court grant all relief to which he or she may be entitled in this proceeding.

I declare (or certify, verify, or state) under penalty or perjury that the foregoing is true and correct. Executed on:

3-5-2003
(Date)

Gary Laurence
Signature of Petitioner

IF MAILED BY PRISONER:

I declare or state under penalty of perjury that this petition was (check one):
☐ delivered to prison officials for mailing, or ☐ deposited in the prison's internal mail system on:

_____ (date).

Gary Laurence
Signature of Petitioner

Revised 07/02

39

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA

CASE NO: ____

GARY LAWRENCE,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the *pro se* Petition for Habeas Corpus, Motion to Proceed in *Forma Pauperis* and financial affidavit have been served by U.S. Mail upon JAMES V. CROSBY, JR., Secretary, Department of Corrections, 2601 Blair Stone Road, Tallahassee, FL 32399-2500, the Office of the Attorney General, BARBARA YATES, Assistant Attorney General, The Florida Capitol Building, Plaza Level One, Tallahassee, Florida 32399-1050 and the Office of the State Attorney, JOHN MOLCHAN, ASA, Santa Rosa County, P.O. Box 645, Milton, Florida 32572 this the 5th day of March, 2003.

/s/ Gary Lawrence
GARY LAWRENCE
PRO SE PETITIONER-DOC#039763
UNION CORRECTIONAL INSTITUTION
P.O. BOX 221
RAIFORD, FL 32083

AO 241 (Rev 5/85)

PETITION UNDER 28 USC § 2254 FOR WRIT OF
HABEAS CORPUS BY A PERSON IN STATE CUSTODY

United States District Court	District NORTHERN DIST. OF FLORIDA	
Name GARY LAWRENCE	Prisoner No. 039763	Case No. 3:03CV97-RH

Place of Confinement
UCI, 7819 NW 228 ST, RAIFORD, FL 32026-4410

Name of Petitioner (include name under which convicted)
GARY LAWRENCE

V.

Name of Respondent (authorized person having custody of petitioner)
JAMES V. CROSBY, JR
SECRETARY DEPT. OF CORRECTIONS

The Attorney General of the State of:
FLORIDA

PETITION

1. Name and location of court which entered the judgment of conviction under attack CIRCUIT COURT
1ST JUDICIAL CIRCUIT IN AND FOR SANTA ROSA COUNTY, FLORIDA
2. Date of judgment of conviction 5/5/95
3. Length of DEATH
4. Nature of offense involved (all counts) 1ST DEGREE PREMEDITATED MURDER; CONSPIRACY TO COMMIT 1ST DEGREE MURDER; ROBBERY WITH A DEADLY WEAPON; THEFT OF A MOTOR VEHICLE - JUDGMENT OF ACQUITTAL ENTERED AND PASSED AS TO FIRST DEGREE - SENTENCE ENTERED ON LIFE/LIFE - DOA ON FELONY MURDER & ROBBERY
5. What was your plea? (Check one)
   (a) Not guilty ☒
   (b) Guilty ☐
   (c) Nolo contendere ☐
   If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details:

6. If you pleaded not guilty, what kind of trial did you have? (Check one)
   (a) Jury ☒
   (b) Judge only ☐
7. Did you testify at the trial?
   Yes ☐ No ☒
8. Did you appeal from the judgment of conviction?
   Yes ☒ No ☐

AO 241 (Rev. 5/85)

9. If you did appeal, answer the following:

(a) Name of court SUPREME COURT OF FLORIDA

(b) Result CONVICTION AND SENTENCE AFFIRMED

(c) Date of result and citation, if known 684 SO 2D 1319 (FLA 1996) - 6/26/97

(d) Grounds raised SEE SUPPLEMENT -- 9(d)

(e) If you sought further review of the decision on appeal by a higher state court, please answer the following:

(1) Name of court N/A

(2) Result

(3) Date of result and citation, if known

(4) Grounds raised

(f) If you filed a petition for certiorari in the United States Supreme Court, please answer the following with respect to each direct appeal:

(1) Name of court UNITED STATES SUPREME COURT

(2) Result CERTIORARI DENIED

(3) Date of result and citation, if known 1/26/98

(4) Grounds raised SEE SUPPLEMENT 9(f)(4)

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any court, state or federal?
Yes ☑ No ☐

11. If your answer to 10 was "yes," give the following information:

(a) (1) Name of court CIR CT 1ST JUDICIAL CIRCUIT FOR SANTA ROSA COUNTY, FLA.

(2) Nature of proceeding FLA R. CRIM P. 3.850 - 3.851 - MOTION TO VACATE; SET ASIDE OR CORRECT

(3) Grounds raised SEE SUPPLEMENT III(a)(1)

42

AO 241 (Rev. 5/85)

(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes ☑ No ☐ – 2 SUBARTS of IAC Claim

(5) Result RELIEF DENIED

(6) Date of result 10/11/00

(b) As to any second petition, application or motion give the same information:

(1) Name of court N/A

(2) Name of proceeding

(3) Grounds raised

(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes ☐ No ☐

(5) Result

(6) Date of result

(c) Did you appeal to the highest state court having jurisdiction the result of action taken on any petition, application or motion?

(1) First petition, etc. Yes ☑ No ☐

(2) Second petition, etc. Yes ☐ No ☐

(d) If you did *not* appeal from the adverse action on any petition, application or motion, explain briefly why you did not:

N/A

12. State *concisely* every ground on which you claim that you are being held unlawfully. Summarize *briefly* the *facts* supporting each ground. If necessary, you may attach pages stating additional grounds and *facts* supporting same.

CAUTION: In order to proceed in the federal court, you must ordinarily first exhaust your available state court remedies as to each ground on which you request action by the federal court. If you fail to set forth all grounds in this petition, you may be barred from presenting additional grounds at a later date.

AO 241 (Rev. 5/85)

For your information, the following is a list of the most frequently raised grounds for relief in habeas corpus proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you may have other than those listed if you have exhausted your state court remedies with respect to them. However, *you should raise in this petition all available grounds* (relating to this conviction) on which you base your allegations that you are being held in custody unlawfully.

Do not check any of these listed grounds. If you select one or more of these grounds for relief, you must allege facts. The petition will be returned to you if you merely check (a) through (j) or any one of these grounds.

(a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily with understanding of the nature of the charge and the consequences of the plea.
(b) Conviction obtained by use of coerced confession.
(c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.
(d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.
(e) Conviction obtained by a violation of the privilege against self-incrimination.
(f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.
(g) Conviction obtained by a violation of the protection against double jeopardy.
(h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impaneled.
(i) Denial of effective assistance of counsel.
(j) Denial of right of appeal.

A. Ground one: See Supplement Question 12

Supporting FACTS (state *briefly* without citing cases or law):

See Supplement Ques. 12

B. Ground two: See Supplement Ques. 12

Supporting FACTS (state *briefly* without citing cases or law):

See Supplement Ques. 12

AO 241 (Rev. 5/85)

C. Ground three: See Supplement Ques 12

Supporting FACTS (state *briefly* without citing cases or law): See Supplement Ques 12

D. Ground four: See Supplement Ques 12

Supporting FACTS (state *briefly* without citing cases or law): See Supplement Ques 12

13. If any of the grounds listed in 12A, B, C, and D were not previously presented in any other court, state or federal, state *briefly* what grounds were not so presented, and give your reasons for not presenting them:

14. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack?
Yes ☐ No ☑

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:
(a) At preliminary hearing John Miller, PO Box 605 Milton FL 32572

(b) At arraignment and plea John Miller

AO 241 (Rev. 5/85)

(c) At trial JOHN MILLER

(d) At sentencing JOHN MILLER

(e) On appeal STEVEN SCHLEIER, 16 NORTH ADAMS ST, QUINCY FL 32353

(f) In any post-conviction proceeding JOSEPH MCDERMOTT, 2116 GULF BLVD, STE A, ST. PETERSBURG, FL 33706

(g) On appeal from any adverse ruling in a post-conviction proceeding JOSEPH MCDERMOTT

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time?
Yes ☑ No ☐

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?
Yes ☐ No ☑
(a) If so, give name and location of court which imposed sentence to be served in the future:

(b) Give date and length of the above sentence:

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?
Yes ☐ No ☐

Wherefore, petitioner prays that the Court grant petitioner relief to which he may be entitled in this proceeding.

Signature of Attorney (if any)

I declare under penalty of perjury that the foregoing is true and correct. Executed on

Date

Signature of Petitioner

SUPPLEMENT TO PETITION FOR RELIEF UNDER TITLE 28 USC § 2254 QUESTION 9(d)

I. DEATH IS A DISPROPORTIONATE SENTENCE FOR GARY LAWRENCE

II. THE STATE DID NOT PROVE BEYOND A REASONABLE DOUBT THAT THE MURDER WAS COLD, CALCULATED AND PREMEDITATED

III. THE TRIAL COURT ERRED IN ITS INSTRUCTIONS TO THE JURY AS TO THE AGGRAVATING FACTOR OF "COLD, CALCULATED AND PREMEDITATED"

IV. THE EVIDENCE PRESENTED BY THE STATE DID NOT SUPPORT A FINDING THAT THE MURDER WAS "HEINOUS, ATROCIOUS OR CRUEL"

V. THE TRIAL COURT'S INSTRUCTION ON "HEINOUS, ATROCIOUS OR CRUEL" WAS CONSTITUTIONALLY INADEQUATE

VI. THE TRIAL COURT FAILED TO MAKE CLEAR TO THE JURY THAT IT COULD EXERCISE ITS REASONED JUDGMENT AND RECOMMEND LIFE IMPRISONMENT EVEN IF THE MITIGATING CIRCUMSTANCES DID NOT OUTWEIGH THE AGGRAVATING CIRCUMSTANCES IN MR. LAWRENCE'S CASE

VII. THE TRIAL COURT IMPROPERLY REJECTED PROFFERED MITIGATION

SUPPLEMENT TO PETITION FOR RELIEF UNDER TITLE 28 USC § 2254 QUESTION 9(f)(4)

1. THE TRIAL COURT ERRED IN DENYING DEFENDANT'S 3.850-MOTION FOR POST CONVICTION RELIEF—INEFFECTIVE COUNSEL CLAIM BASED UPON TRIAL COUNSEL'S CONCESSION OF GUILT IN BOTH GUILT AND PENALTY PHASES WITHOUT ON THE RECORD CONSENT BY DEFENDANT. (CONTRARY TO DUE PROCESS AND ASSISTANCE OF COUNSEL PROVISIONS OF V, VI AND XIV AMENDMENTS OF THE UNITED STATES CONSTITUTION AND SECTIONS 9 AND 16 OF THE FLORIDA CONSTITUTION.)

2. THE TRIAL COURT ERRED IN DENYING DEFENDANT'S 3.850-MOTION FOR POST CONVICTION RELIEF—INEFFECTIVE COUNSEL CLAIM BASED UPON TRIAL COUNSEL'S FAILURE TO ADEQUATELY ADVISE DEFENDANT OF HIS RIGHT TO TESTIFY AND FAILURE TO OBTAIN A RECORD WAIVER OF THIS RIGHT. (VIOLATION OF V, VI AND XIV AMENDMENTS OF THE UNITED STATES CONSTITUTION AND SECTIONS 9 AND 16 OF THE FLORIDA CONSTITUTION.)

3. THE TRIAL COURT ERRED IN DENYING DEFENDANT'S 3.850-MOTION FOR POST CONVICTION RELIEF UPON GROUNDS THE PROSECUTION ENGAGED IN BURDEN SHIFTING ARGUMENT AND INDIRECT COMMENTS ON DEFENDANT'S FAILURE TO TESTIFY IN THE GUILT PHASE. (VIOLATION OF V, VI AND XIV AMENDMENTS OF THE UNITED STATES CONSTITUTION AND SECTION 9 OF THE FLORIDA CONSTITUTION.)

SUPPLEMENT TO PETITION FOR RELIEF UNDER TITLE 28 USC § 2254 QUESTION 11(a)(3)

GROUND 1.: Denial of effective assistance of counsel.

GROUND 2.: Denial of Right to Impartial Jury Due Process Violation.

GROUND 3.: Due Process Violated by Trial Court Regarding Defendant's Prior Prison Record

GROUND 4.: Lack of Sentencing Proportionality Between Equally Culpable Codefendants.

GROUND 5.: Due Process Violation Improper Aggravator Evidence.

GROUND 6: Ineffective Assistance of Counsel.

GROUND 7: Public Records Unavailable

GROUND 8.: Judicial Records Unavailable

GROUND 9.: The Trial Court erroneously instructed Mr. Lawrence's jury on the standard by which they must judge expert testimony.

GROUND 10: Mr. Lawrence is innocent of the death penalty.

GROUND 11.: The Florida Supreme Court failed to conduct a meaningful harmless error analysis when considering the effects of an erroneous jury instruction regarding the heinous, atrocious or cruel and cold, calculating and premeditated aggravating circumstances in violation of the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution.

GROUND 12.: Mr. Lawrence's jury was improperly instructed on the under sentence of imprisonment aggravating factor in violation of *Espinosa v. Florida, Stringer v. Black, Maynard v. Cartwright, Hitchcock v. Dugger* and the the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution.

GROUND 13: Mr. Lawrence's sentencing jury was misled by comments and instruction which unconstitutionally and inaccurately diluted its sense of responsbility for sentencing in violation of the Eighth and Fourteenth Amendments to the Untied States Constitution.

GROUND 14.: Florida Capital sentencing statute is unconstitutional on its face and as applied in this case because it fails to prevent the arbitrary capricious imposition of the death penalty and it violates the Constitutional guarantees of due process and prohibiting cruel and unusual punishment.

GROUND 15.: Motion to Amend 3.850 Amendment Request.

Supplement to Petition for Relief under Title 28 U.S.C. § 2254 Question 12

GROUND I: DENIAL OF EFFECTIVE ASSISTANCE OF COUNSEL

Trial counsel for this intellectually challenged, severely alcoholic and drug dependant defendant "threw in the towel" at both the guilt and the penalty phases of the prosecution thereby denying Mr. Lawrence the type and quality of representation which would have meaningfully challenged the prosecution's case and would have comported with the Sixth Amendment. Mr. Lawrence received ineffective assistance of counsel from which prejudice flowed. This prejudice was of the type and quantum that the results of the guilt and penalty phases of the trial cannot be relied upon.

There are multiple factual bases for this allegation.

A. Defense counsel, without the knowledge or acquiescence of the defendant, who continued to persist in his plea of not guilty, clearly admitted—without authorization—that the defendant was guilty "of something."

B. Defense counsel failed to advise the defendant of his right to testify at the guilt or the penalty phases of his trial and therefore this important right was not knowingly, intelligently or voluntarily waived.

C. Defense counsel failed to present sufficient expert or non-expert testimony as to fetal alcohol syndrome, the extent of Mr. Lawrence's life-long addictions to alcohol and drugs; and the effect of drugs on Mr. Lawrence on the day of the incident.

D. Defense Counsel failed to effectively investigate or present the defense of intoxication ineffectively.

E. Defense counsel failed to present adequate evidence of defendant's emotional state, mental state, intelligence levels, and mental deficiencies each of which was relevant to guilt; to whether there was a knowing waiver of rights; and to penalty phase mitigation.

F. Defense counsel failed to object to assertions by the State in its opening presentation on the charge of robbery for which the State knew that there was no credible, admissible basis and which was argued to underlie the then-theory of felony murder.

G. Defense counsel failed to move for a mistrial when the State made burden shifting comments made by the state in the penalty phase.

H. Defense counsel was inadequately prepared for a death penalty phase and, in spite of the fact that this was his first death case, no co-counsel was requested nor appointed to assist him.

I. Defense counsel was ineffective when he stated that codefendant was not to be held to the same degree of culpability.

J. Appellate defense counsel failed to raise any issues as to the guilt phase of the trial on appeal, including suppression or the unconstitutionality of the death penalty itself although, *inter alia*, these issues were preserved.

K. Defense counsel rendered inadequate assistance of counsel when he failed to object to burden shifting State arguments which were comments on the defendant's failure to testify.

L. Defense counsel rendered inadequate assistance of counsel when he waived, at the trial stage, the issues of suppression.

M. Defense trial and appellate counsel failed to provide effective assistance of counsel when, the comment from a State witness that he had known Gary Lawrence since Gary got out of prison, went unaddressed.

N. Defense counsel rendered ineffective assistance of counsel when counsel entered into a written stipulation, not signed by Gary Lawrence, as to the identity of the body which was located by police.

GROUND 2

Although Gary Lawrence and his wife-co-defendant Brenda Lawrence were of equal culpability, and although the death penalty's Constitutionality is hinged on a meaningful proportionality between sentences, the trial court when it did not make a meaningful comparison of the roles of the two defendants v. the sentences received by the two defendants. The Supreme Court, likewise, did not engage in adequate proportionality review as to the sentence of Gary Lawrence.

GROUND 3

The State's death penalty scheme is unconstitutional in that it deprives the defendant of a unanimous verdict of death from the jury. Rather, the scheme provides for the sentencing jury to hear evidence and to propound a numerical verdict. The court then, with no knowledge of the factual underpinnings of the verdict, takes the verdict into consideration, purportedly giving it great weight. However, it is solely the sentencing judge who makes the sentencing decision of life or death.

The jury was told that it had "advisory" functions only and repeated comments by the State, reinforced by jury instructions, unconstitutionally diluted the responsibility which the "jurors"—although not decision makers—were to labor under.

Ground 4

The Court and all parties to the litigation have a heightened duty to the defendant when it is apparent that he does not understand or even recall those things which are happening or have happened in his prosecution, or he is emotionally impaired.

Ground 5

The trial court failed to permit evidence or to entertain legal argument on the following issues. Taken singly or together they set out significant violations of the Constitutional rights of Mr. Lawrence under the United States Constitution and its Amendments.

A. The processes in place in Santa Rosa County for the assembly of jury venires violated the Fifth and Sixth Amendments to the United States Constitution, as incorporated in the Fourteenth Amendment, were not tailored to and did not yield a cross section of the citizenry and virtually assured that the resultant

venire and petit juries were the result of purposeful discrimination.

B. The failure of the court to grant a mistrial when a State witness stated that he had known Mr. Lawrence since Lawrence **got out of prison** *before the trial penalty phase jury* denied Lawrence due process.

C. The Florida death scheme which permits the introduction of evidence of "under a sentence of imprisonment" is unconstitutional as applied in this case in that it permits this aggravating factor even though the defendant is on "conditional release."

D. Defense counsel was forced to prepare and proceed on his Florida Motion to Vacate without provision of all Public Records or Judicial Records.

E. Mr. Lawrence was denied due process when his jury was given an erroneous expert witness jury instruction.

F. Since the instructions given on the issues of "under the sentence of imprisonment," heinous, atrocious and cruel, and cold, calculated and premeditated, the Florida courts utilized incorrect law in establishing that any aggravator existed, therefore, Mr. Lawrence is innocent of the death penalty. In spite of this the Florida Supreme Court failed in its "harmless error" analysis, and Mr Lawrence submits that these errors did contribute to his verdicts.

G. Florida's capital sentencing statute is unconstitutional on its face and as applied because it fails to prevent arbitrary and capricious imposition of death and violated due process and fails to prohibit cruel and unusual punishment.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

Case No. 3:03CV97-rh
CAPITAL CASE

GARY LAWRENCE,

Petitioner,

v.

JAMES V. CROSBY,

Respondent.

RESPONSE TO ORDER TO SHOW CAUSE WHY A WRIT OF HABEAS CORPUS SHOULD NOT BE GRANTED

Comes now Respondent, by and through counsel, and in response to this Court's order to show cause why a writ of habeas corpus should not be granted, states as follows:

Statement of Custody and Parties

Named petitioner, Gary Lawrence, presently is in the custody of the Florida Department of Corrections at the Union Correctional Institution in Raiford, Florida. Petitioner, convicted of one count each of first-degree murder, conspiracy to commit murder, auto theft, and petty theft, was sentenced to death on the murder charge, received two concurrent terms of five years imprisonment for conspiracy and auto theft, and time served on the petty theft charge. Petitioner thus is in the lawful custody of the State of Florida. Petitioner's custodian, James V. Crosby, Secretary of the Florida Deparment of Corrections, is the properly named party respondent. *See* 28 U.S.C. § 2254, Rule 2(a).

Statement of Exhibits[1]

1. Respondent's Exhibit 1 is a true and correct copy of the Exhibits Index in petitioner's direct appeal to the Florida Supreme Court, cause number 85,725, styled *Gary Lawrence v. State of Florida*, and is herein incorporated by reference;

2. Respondent's Exhibits 2-I, 2-II, 2-III, 2-IV, 2-V, 2-VI, 2-VII, and 2-VIII are true and correct copies of the Transcript Of The Record, Volumes I-VIII, in cause number 85,725, encompassing Tab #s A-S, U-KK[2], and are herein incorporated by reference;

3. Respondent's Exhibit 3 is a true and correct copy of the Brief Of Appellant filed in cause number 85,725, encompassing Tab #LL, and is herein incorporated by reference;

4. Respondent's Exhibit 4 is a true and correct copy of the State's Answer Brief Of Appellee in cause number 85,725, encompassing Tab #MM, and is herein incorporated by reference;

5. Respondent's Exhibit 5 is a true and correct copy of the Reply Brief Of Appellant in cause number 85,725, and is herein incorporated by reference;

6. Respondent's Exhibit 6 is a true and correct copy of the Opinion of the Florida Supreme Court in cause number 85,725, dated August 28, 1997, encompassing Tab #NN, and is herein incorporated by reference;

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[1] A "Notice Of Filing" and the above-listed exhibits which are in paper form only and will be maintained in the Clerk's Office, have been sent to the Clerk's Office for filing.

[2] Filed contemporaneously with this Response is "Respondent's Habeas Corpus Checklist," identifying applicable tab numbers included in the checklist pursuant to Local Rule 5.1(K)(2). The checklist was filed as an attachment to the "Notice Of Filing Habeas Corpus Checklist."

7. Respondent's Exhibit 7 is a true and correct copy of the Order of the United States Supreme Court denying petitioner's Petition For Writ Of Certiorari, dated January 20, 1998 in cause number 97-6787, styled *Gary Lawrence v. Florida*, and is herein incorporated by reference;

8. Respondent's Exhibit 8 is an Order Appointing Counsel in cause number 94-397-CFA, styled *State of Florida v. Gary Lawrence*, and is herein incorporated by reference;

9. Respondent's Exhibits 9-I and 9-II are true and correct copies of the Transcript Of Record, Volumes I and II, in petitioner's appeal from the denial of postconviction relief, cause number SC00-2290, styled *Gary Lawrence v. State of Florida*, encompassing Tab #s OO-PP, and RR, and are herein incorporated by reference;

10. Respondent's Exhibit 10 is a true and correct copy of the Supplemental To Appeal, Volume I, in cause number SC00-2290, encompassing Tab #QQ, and is herein incorporated by reference;

11. Respondent's Exhibit 11 is a true and correct copy of petitioner's Initial Brief Of Appellant in cause number SC00-2290, encompassing Tab #SS, and is herein incorporated by reference;

12. Respondent's Exhibit 12 is a true and correct copy of the petitioner's Appendix To Initial Brief Of Appellant in cause number SC00-2290, and is herein incorporated by reference;

13. Respondent's Exhibit 13 is a true and correct copy of the State's Answer Brief Of Appellee in cause number SC00-2290, encompassing Tab #TT, and is herein incorporated by reference;

14. Respondent's Exhibit 14 is a true and correct copy of petitioner's Appellant's Reply Brief in cause number SC00-2290, and is herein incorporated by reference;

15. Respondent's Exhibit 15 is a true and correct copy of petitioner's Amended Petition For Writ Of Habeas Corpus, cause number SC01-674, and is herein incorporated by reference;

16. Respondent's Exhibit 16 is a true and correct copy of petitioner's Appendix To Amended Petition For Writ Of Habeas Corpus, cause number SC01-674, and is herein incorporated by reference;

17. Respondent's Exhibit 17 is a true and correct copy of the State's Response To Amended Petition For Writ Of Habeas Corpus in cause number SC01-674, and is herein incorporated by reference;

18. Respondent's Exhibit 18 is a true and correct copy of petitioner's Reply To Response To Amended Petition For Writ Of Habeas Corpus in cause number SC01-674, and is herein incorporated by reference;

19. Respondent's Exhibit 19 is a true and correct copy of the Opinion of the Florida Supreme Court in causes SC00-2290 and SC01-674, dated October 17, 2002, encompassing Tab #UU, and is herein incorporated by reference; and

20. Respondent's Exhibit 20 is a true and correct copy of the Mandate of the the Florida Supreme Court in causes SC00-2290 and SC01-674, dated November 18, 2002, and is herein incorporated by reference.

Statement of Issues

Petitioner states the following grounds in his amended petition seeking federal habeas corpus relief [3]:

1. Ineffective Assistance of Trial Counsel, with the following subparts:

A. Defense counsel admitted without petitioner's knowledge or acquiescence that petitioner was guilty of something;

B. Defense counsel failed to advise petitioner of his right to testify;

C. Defense counsel failed to present sufficient testimony as to fetal alcohol syndrome, the extent of petitioner's addictions to alcohol and drugs, and the effect of drugs on petitioner the day of the murder;

D. Defense counsel failed to effectively investigate or effectively present the defense of intoxication;

E. Defense counsel failed to present adequate evidence of petitioner's emotional state, mental state, intelligence, and mental deficiencies as to the guilt phase, in respect to whether defendant knowingly waived his rights, and as to penalty phase mitigation;

F. Defense counsel failed to object to the State's opening statement as to the charge of robbery;

G. Defense counsel failed to move for a mistrial at the penalty phase when the State made burden shifting comments;

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[3] Through appointed counsel, an amended petition was filed on September 8, 2003. Previously, petitioner filed a pro se petition on March 11, 2003, which did not include all of the issues now presented in the amended petition. Respondent addresses the implication of this distinction, *infra*, at 15-20.

H. Defense counsel was inadequately prepared for the penalty phase and no co-counsel was requested or appointed;

I. Defense counsel was ineffective when he stated that petitioner's co-defendant was not to be held to the same degree of culpability;

J. Appellate defense counsel failed to raise any issues as to the guilt phase, including suppression and unconstitutionality of the death penalty;

K. Defense counsel failed to object to burden shifting State arguments that were comments on petitioner's failure to testify;

L. Defense counsel was ineffective for waiving at trial the issues of suppression;

M. Trial and appellate counsel were ineffective for not raising the comment by the State's witness that he knew petitioner since he got out of prison;

N. Defense counsel was ineffective for entering into a written stipulation as to the identity of the body located by police;

2. Neither the trial court nor the Florida Supreme Court engaged in an adequate proportionality review as to petitioner's sentence in comparison to that of his co-defendant's;

3. Florida's death penalty scheme is unconstitutional as it does not require a unanimous verdict, the judge imposes the sentence, and the jurors are told that their role is advisory;

4. "The Court and all parties to the litigation have a heightened duty to the defendant when it is apparent that he does not understand or even recall those things which are happening or have happened in his prosecution, or he is emotionally impaired"; and

5. The trial court failed to permit evidence or allow argument on the following:

A. The jury selection procedure in Santa Rosa County does not yield a fair cross section and assures that the resulting jury is the result of purposeful discrimination;

B. That it was a denial of due process not to grant a mistrial when the State's witness testified that he had known petitioner since he got out of prison;

C. That Florida's death penalty scheme is unconstitutional as applied in this case in that it permits the aggravating factor "under a sentence of imprisonment" when the defendant is on conditional release;

D. That petitioner's state postconviction relief counsel was forced to prepare and proceed on petitioner's motion for postconviction relief without provision of all state public records;

E. That it was a denial of due process when petitioner's jury was given an erroneous expert witness jury instruction;

F. That the Florida courts used incorrect law in establishing the aggravating circumstances and that petitioner is innocent of the death penalty; and

G. That Florida's death penalty scheme is unconstitutional on its face and as applied.

Statement of Procedural History

On May 5, 1995, Lawrence was sentenced to death in accord with the jury's 9-3 vote recommending death upon his conviction for first-degree murder. Respondent's Exhibit 2-II, at 239, 242. The Circuit Court for the First Judicial Circuit in and for Santa Rosa County, Florida also sentenced Lawrence to two concurrent terms of five years imprisonment for his

conspiracy to commit murder and auto theft convictions, and to time served for the petty theft conviction. Respondent's Exhibit 2-II, at 240, 245, 248. Petitioner sought direct review by the Florida Supreme Court, Respondent's Exhibit 3, which affirmed petitioner's judgment of conviction and sentence on August 28, 1997. Respondent's Exhibit 6 (reported at *Lawrence v. State*, 698 So. 2d 1219 (Fla. 1997)). The United States Supreme Court thereafter denied Lawrence's petition for writ of certiorari on January 20, 1998. Respondent's Exhibit 7 (reported at *Lawrence v. Florida*, 522 U.S. 1080 (1998)).

Petitioner subsequently filed his initial motion for postconviction relief on January 19, 1999, Respondent's Exhibit 9-I, at 1, and an amended motion was filed on April 22, 1999. Respondent's Exhibit 9-I, at 21. An order denying Rule 3.850 state postconviction relief was entered on October 11, 2000. Respondent's Exhibit 9-II, at 192. Petitioner appealed to the Florida Supreme Court, Respondent's Exhibit 11, which affirmed the denial of postconviction relief on October 17, 2002. Respondent's Exhibit 19 (reported at *Lawrence v. State*, 831 So. 2d 121 (Fla. 2002)). That court issued its mandate on November 18, 2002, Respondent's Exhibit 20, and the United States Supreme Court denied Lawrence's petition for writ of certiorari on March 24, 2003. *Lawrence v. Florida*, 123 S.Ct. 1575 (2003).

Lawrence filed his initial petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 on March 11, 2003, and following the appointment of counsel, filed through counsel an amended petition on September 8, 2003.

Statement of State Court Findings of Fact

As found by the Florida Supreme Court, following are the presumptively-correct state court findings of fact:

> Shortly after Gary and Brenda Lawrence were married, they separated, and another man, Michael Finken,

moved in with Brenda and her two daughters, Stephanie and Kimberly Pitts, and Stephanie's friend, Rachel Matin. On the day of the murder, July 28, 1994, Gary and Michael drove Brenda to work and then drank beer at a friend's house. Later, Gary and Michael picked Brenda up and the three returned to the friend's house where they drank more beer. After the three returned to Brenda's apartment, Gary and Michael argued and Gary hit Michael when he learned that Michael had been sleeping with Brenda. Gary and Michael seemed to resolve their differences, and Michael fell asleep on the couch. Gary and Brenda conversed, and Brenda went through the house collecting weapons—including a pipe and a baseball bat. Gary and Brenda told Kimberly and Rachel that they were "going to knock off Mike." Gary told Kimberly to "stay in your bedroom no matter what you hear."

The trial court described what happened after Gary and Brenda spoke to the girls:

> Thereafter, the two girls heard what they described as a pounding sound. At one point, Rachel Matin stated that she heard the victim say, "stop it, if you stop, I'll leave." She stated that she heard that statement several times. Kimberly Pitts stated she heard the victim say "please don't hit me, I'm already bleeding." The victim's pleas, however, were met with more pounding. Once the pounding stopped, the girls were required to assist in the clean up and described to the jury what they observed. Kimberly stated that much of the victim's right side of his face was missing and his chin was knocked over to his ear. Rachel Matin stated that there was no skin left on the victim's face and part of his nose was missing. Apparently the victim was still alive. Kimberly observed her mother coming out of the kitchen area with what appeared to be a

> dagger and then, although not seeing the dagger in her hand at the time, observed her mother make a stabbing motion toward the victim with something in her hand.
>
> It was at that time when Brenda Lawrence requested that the girls obtain the assistance of Chris Wetherbee. Upon his entrance into the home, Cris Wetherbee observed the victim's head being caved in, blood all over, the victim's eyeball protruding approximately three inches and a mop handle shoved into the victim's throat. Wetherbee asked Gary Lawrence, "what's going on?" At which time the Defendant responded by pulling out the mop handle and kicking the victim and making the statement "this is what's going on." Immediately after removing the mop handle from the victim's throat, Wetherbee heard the victim give approximately three or four ragged breaths at which time the victim thereafter stopped breathing and apparently expired. The Defendant, Gary Lawrence, told Wetherbee that he had beat him with a pipe until it bent and then beat him with a baseball bat.

Chris Wetherbee summarized the victim's state: "And [he] looked like something off of one of the real good horror movies." Gary and Brenda then removed a small amount of money from Michael's pockets, wrapped the body in a shower curtain and placed the body in Michael's car, and Gary drove to a secluded area where he set the body afire. When Gary returned home, he and Brenda danced.

Gary Lawrence was arrested later that evening driving Michael's car and subsequently confessed, admitting that he had beaten Michael because Michael had been sleeping with Brenda. Lawrence was charged with first-degree murder, robbery, grand theft of a motor vehicle, and conspiracy to commit murder. At trial, the medical

examiner testified as follows: Michael died of blunt trauma and possible asphyxia; Michael was alive when the mop handle was thrust down his throat; Michael's blood alcohol level was very high; and one or more of the blows to Michael's head could have caused loss of consciousness. Lawrence was convicted of first-degree murder, conspiracy to commit murder, auto theft, and petty theft.

During the penalty phase, Lawrence presented testimony of a brother, a psychologist, and a psychiatrist. The court followed the jury's nine-to-three vote and imposed a sentence of death based on three aggravating circumstances,[1] no statutory mitigating circumstances, and five nonstatutory mitigating circumstances.[2] Lawrence also was sentenced to concurrent five-year terms of imprisonment on the conspiracy and auto theft charges and time served on the petty theft charge. (Brenda was tried separately and sentenced to life imprisonment for her role in the crimes.). . . .

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[1] The court found that the murder had been committed while Lawrence was under sentence of imprisonment; that the murder was heinous, atrocious, or cruel (HAC); and that the murder was committed in a cold, calculated, and premeditated manner (CCP).

[2] The court found that Lawrence cooperated with police; Lawrence had a learning disability and low IQ; Lawrence had a deprived childhood; Lawrence was under the influence of alcohol at the time of the crimes; and Lawrence does not have a violent history.

Respondent's Exhibit 6, at 1-2 (reported at *Lawrence*, 698 So. 2d at 1220-1221).

- *Statement of Untimeliness*

I. Pro Se Habeas Petition Filed On March 11, 2003

Pursuant to 28 U.S.C. § 2244(d)(1), effective April 24, 1996, "[a] 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody

pursuant to the judgment of a State court." Because petitioner filed his initial petition on March 11, 1998[4], subsequent to the effective date of the Anti-Terrorism and Effective Death Penalty Act (AEDPA), the time limitation period under § 2244(d)(1) applies. Accordingly, petitioner had one year from the date his direct appeal became final to file his federal petition. *Webster v. Moore*, 199 F.3d. 1256, 1258 n.3 (11th Cir.), *cert. denied*, 531 U.S. 991 (2000). However, the one-year statute of limitations is tolled "[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending . . . ." *Id.* at 1257 (*quoting* § 2244(d)(2)).

Petitioner's conviction became final for purposes of 28 U.S.C. § 2244(d) on January 20, 1998, when the United States Supreme Court denied his petition for writ of certiorari. *Smith v. Bowersox*, 159 F.3d 345, 348 (8th Cir. 1998), *cert. denied*, 525 U.S. 1187 (1999) ("[T]he running of the statute of limitations imposed by § 2244(d)(1)(A) is triggered by either (i) the conclusion of all direct criminal appeals in the state system, followed by either the completion or denial of certiorari proceedings before the United States Supreme Court; or (ii) if certiorari was not sought, then by the conclusion of all direct criminal appeals in the state system followed by the expiration of the time allotted for filing a petition for the writ."); *see also Clay v. United States*, 537

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[4] While petitioner's pro se petition was received by the clerk's office on March 13, 2003, his "Certificate Of Service" is dated March 11, 2003, the same date filing is reflect on the Civil Docket For Case #: 03-CV-97 obtained from the PACER system. Apparently pursuant to the prisoner mailbox rule, *Houston v. Lack*, 487 U.S. 266, 275 (1988), the petition was deemed filed on March 11, 2003. *Cf. Adams v. United States*, 173 F.3d 1339, 1341 (11th Cir. 1999) (applying the mailbox rule to pro se filings of motions under 28 U.S.C. § 2255); *accord Nichols v. Bowersox*, 172 F.3d 1068, 1077 (8th Cir. 1999) (en banc) (for purposes of 28 U.S.C. § 2244(d)(1), a pro se habeas petition is deemed filed when placed into the prison mail system).

U.S. 522, 531 (2003) ("The words 'by the conclusion of direct review or the expiration of the time for seeking such review' make it clear that finality for the purpose of § 2244(d)(1)(A) is to be determined by reference to a uniform federal rule."); *Bond v. Moore*, 309 F.3d 770, 774 (11th Cir. 2002) (petitioner's state conviction did not become final for purposes of § 2244(d)(1) until the ninety-day period that he had to file for certiorari review in the United States Supreme Court expired, where petitioner did not seek such discretionary review); *but see Tinker v. Moore*, 255 F.3d 1331, 1333 (11th Cir. 2001) (for purposes of § 2244(d)(1), "[u]nder Florida law, a judgment against a criminal defendant becomes final upon issuance of the mandate on his direct appeal."), *cert. denied*, 534 U.S. 1144 (2002).

While petitioner's conviction thus became final for purposes of § 2244(d)(1) on January 20, 1998, pursuant to 28 U.S.C. § 2244(d)(2), the period in which his timely application for postconviction relief under Florida Rule of Criminal Procedure 3.850 was pending tolled the running of the limitation period. Here, petitioner filed his postconviction motion on January 19, 1999 (Respondent's Exhibit 9-I, at 1), after 364 days of the one-year period ran. The limitation period was then tolled from January 19, 1999 to November 18, 2002, when the Florida Supreme Court issued its mandate (Respondent's Exhibit 20), having previously affirmed the denial of postconviction relief (Respondent's Exhibit 19). *Carey v. Safford*, 536 U.S. 214, 219-220 (2002) ("[A]n application is pending as long as the ordinary state collateral review process is 'in continuance'—i.e., 'until the completion of' that process. In other words, until the application has achieved final resolution through the State's post-conviction procedures, by definition it remains 'pending.'"); *cf. Nyland v. Moore*, 216 F.3d 1264, 1267 (11th Cir. 2000) ("In Florida, a state court of appeals' order denying a rehearing on its affirmance of the state trial court's denial of a motion for post-conviction relief is pending until the mandate issues.");

see also Coates v. Byrd, 211 F.3d 1225, 1227 (11th Cir. 2000) ("We agree with the Tenth and Fifth Circuits that the time during which a petition for writ of certiorari is pending, or could have been filed, *following the denial of collateral relief in the state courts*, is not to be subtracted from the running of time for 28 U.S.C. § 2244(d)(1) statute of limitations purposes.") (emphasis added), *cert. denied*, 531 U.S. 1166 (2001). Accordingly, following the tolling under § 2244(d)(2) when the postconviction relief motion was no longer pending, petitioner's habeas petition was due within one day, on November 19, 2002. Because the initial petition was not filed until March 11, 2003, nearly four months later, it is time-barred.

Because § 2244(d) is a limitation period, it may be subject to equitable tolling. *See Wyzykowski v. Department of Corrections*, 226 F.3d 1213, 1216 n.2 (11th Cir. 2000). "The burden of establishing entitlement to this extraordinary remedy plainly rests with the petitioner." *Drew v. Dept. of Corrections*, 297 F.3d 1278, 1286 (11th Cir. 2002), *cert. denied*, 537 U.S. 1237 (2003). Petitioner, however, does not acknowledge that he is time-barred, and thus fails to offer any basis for tolling the limitation period, thereby failing to meet his burden.

"Federal courts have typically extended equitable relief only sparingly . . . [including] situations where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass." *Irwin v. Dept. of Veterans Affairs*, 498 U.S. 89, 96 (1990). "In asking the court to equitably toll the statute of limitations, [petitioner] requests a judicially-crafted remedy that has *always* been reserved only for parties who have pursued their rights diligently and whose untimeliness is due entirely beyond their control." *Drew*, 297 F.3d at 1291 n.5 (emphasis in original). Thus equitable tolling affords the otherwise time-barred peti-

tioner an exceedingly narrow window of relief; "[e]quitable tolling is proper only when extraordinary circumstances *beyond a prisoner's control* make it *impossible* to file a petition on time. . ." *Kreutzer v. Bowersox*, 231 F.3d 460, 463 (8th Cir. 2000) (holding that capital habeas petitioner was time-barred under § 2244(d) and finding no basis for applying equitable tolling) (emphasis added), *cert. denied*, 534 U.S. 863 (2001); *Sneed v. Head*, 219 F.3d 1298, 1300 (11th Cir. 2000) (equitable tolling is available "when a movant untimely files because of extraordinary circumstances that are both beyond his control and unavoidable even with diligence.") (internal quotation marks and citation omitted).

Respondent does not believe that petitioner acted diligently or that there existed exceptional circumstances beyond petitioner's control preventing him from timely seeking habeas relief, and because petitioner does not acknowledge that his petition is untimely, he offers no basis for this Court to apply equitable tolling. Instead, it appears that petitioner was under the erroneous impression that his petition was due "one day after denial of certiorari" from the appeal affirming the denial of postconviction relief. *See* Pro Se Petition, at ¶ 13. As noted *supra*, at 13, however, the time during which a petition for writ of certiorari is pending following the denial of collateral relief in the state courts is not to be subtracted from the running of the limitation period. *Coates*, 211 F.3d at 1227. Nor does erroneous advice by counsel provide a basis for equitable tolling. *Helton v. Secretary for the Dept. of Corrections*, 259 F.3d 1310, 1313 (11th Cir. 2001), *cert. denied*, 535 U.S. 1080 (2002). The fact that this is a capital case neither requires nor provides a valid reason for reaching a different result. *Rouse v. Lee*, 339 F.3d 238, 253-254 (4th Cir. 2003) (en banc); *see also Kreutzer v. Bowersox*, 231 F.3d 460 (8th Cir. 2000) (death penalty case not accorded equitable tolling).[5]

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[5] In the event that petitioner may offer argument for the first time in his

Based upon the forgoing, filing of the habeas petition on March 11, 2003 renders the petition untimely and it should be dismissed with prejudice.[6]

II. Amended Habeas Petition Filed On September 8, 2003

Alternatively, even if the initial federal habeas petition filed on March 11, 2003 is deemed timely, the amended petition filed on September 8, 2003 clearly was filed after the running of the limitation period, and those claims not raised in the original petition that are presented in the amended petition are untimely as they do not relate back to the original pleading.

To the extent that petitioner may rely upon Rule 15(c) of the Federal Rules of Civil Procedure[7] and argue that the

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Traverse to the State's Response to invoke equitable tolling, Respondent respectfully requests the opportunity to respond to any such argument.

[6] In the event that the Court were to decide the threshold timeliness issue and determine that the petitioner is not time-barred under 28 U.S.C. § 2244(d), Respondent respectfully requests the opportunity to address the merits of the grounds raised and/or whether petitioner's grounds for relief are procedurally subject to review. *Cf. Caspari v. Bohlen*, 510 U.S. 383, 389 (1994) ("A threshold question in every habeas case, therefore, is whether the court is obligated to apply the *Teague* rule to the defendant's claim. We have recognized that the nonretroactivity principle 'is not "jurisdictional" in the sense that [federal courts] . . . must raise and decide the issue sua sponte.' Thus, a federal court may, but need not, decline to apply *Teague* if the State does not argue it. **But if the State does argue that the defendant seeks the benefit of a new rule of constitutional law, the court must apply *Teague* before considering the merits of the claim.**") (emphasis added; internal citations omitted).

[7] Rule 15(c) of the Federal Rules of Civil Procedure provides in pertinent part as follows:

> (c) Relation Back of Amendments. An amendment of a pleading relates back to the date of the original pleading when . . . (2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, ...

Court should hold that his amended petition "relates back" to the filing of the original petition, cases from the Eleventh Circuit Court of Appeals

> indicate that equitable tolling based on relation back is inappropriate. [That Court has] recognized that Rule 15(c) has been revised to prevent parties against whom claims are made from taking unjust advantage of otherwise inconsequential pleading errors to sustain a limitations defense. *Pruitt v. United States*, 274 F.3d 1315, 1318 (11th Cir. 2001) (quoting Advisory Committee Note to 1991 Amendments to Rule 15). . . . Th[e] relatively narrow purpose of Rule 15(c) can be thwarted in the post-conviction context: the effective date of the claims made in amendments to habeas corpus petitions [would be] irrelevant, because if the claim could not be added by amendment, it could be asserted by subsequent petition that would not be barred by any limitations period. . . . *Pruitt*, 274 F.3d at 1318.

Jones v. United States, 304 F.3d 1035, 1042 (11th Cir. 2002) (internal footnote and quotation marks omitted). In *Dean v. United States*, 278 F.3d 1218 (11th Cir. 2002), the Eleventh Circuit discussed the relation back doctrine as follows:

> Recognizing that this Court had not yet reviewed a Rule 15(c) petition in the context of a habeas corpus petition, we took guidance from other circuits in developing the rule:
>
> > This Court has not addressed Rule 15(c) in the context of a § 2255 motion. However, three circuits have addressed this precise issue. All three circuits held that for an untimely § 2255 claim to "relate back" under Rule 15(c), the untimely claim must have more in common with the timely filed claim than the mere fact that they arose out of the same trial and sentencing proceedings. *See United States v. Pittman*,

> 209 F.3d 314 (4th Cir. 2000); *United States v. Duffus*, 174 F.3d 333 (3d Cir.), *cert. denied*, 528 U.S. 866, 120 S. Ct. 163, 145 L. Ed. 2d 138 (1999); *United States v. Craycraft*, 167 F.3d 451 (8th Cir. 1999). Instead, in order to relate back, the untimely claim must have arisen from the "same set of facts" as the timely filed claim, not from separate conduct or a separate occurrence in "both time and type." *Pittman*, 209 F.3d at 318 ("both time and type"); *Duffus*, 174 F.3d at 337 ("same set of facts"); *Craycraft*, 167 F.3d at 457 ("same set of facts" and "both time and type").

217 F.3d at 1344.

> The key consideration is that the amended claim arises from the same conduct and occurrences upon which the original claim was based. This may be the case even if one or both claims do not explicitly state supporting facts. When the nature of the amended claim supports specifically the original claim, the facts there alleged implicate the original claim, even if the original claim contained insufficient facts to support it. One purpose of an amended claim is to fill in facts missing from the original claim. Applying this rule to the instant case, we hold that three of Dean's amended claims on appeal expand the facts, and serve to further specify his original claims. This is precisely the sort of amendment contemplated by Rule 15(c).

Dean, 278 F.3d at 1222. In respect to Rule 15(c) of the Federal Rules of Civil Procedure, there is no basis for treating § 2254 habeas petitions differently from those brought by federal prisoners under § 2255. *Cf. Bond*, 309 F.3d at 774 ("[T]he limitations provisions under the two statutes are virtually identical. Section 2255 says the limitation period shall run from 'the date on which the judgment of conviction becomes final.' 28 U.S.C. § 2255(1). Section 2244(d) says the limitation period shall run from 'the date on which the

judgment became final by the conclusion of direct review or the expiration of the time for seeking such review.' 28 U.S.C. § 2244(d)(1)(A)," and interpreting § 2244(d)(1) in accord with § 2255(1) as discussed in *Kaufmann v. United States*, 282 F.3d 1336, 1339 (11th Cir.), *cert. denied*, 537 U.S. 875 (2002)).

Petitioner's amendment to the original petition did not cure a technical defect but in effect evades the limitation period by raising new claims. Indeed, petitioner's claims in the amended petition asserted as Grounds 1M, 1N, 2, 3, 4, and 5A-5G did not arise out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading.[8] *Accord Davenport v. United States*, 217 F.3d 1341,

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[8] Issues raised in the original habeas petition included the following:

1. Ineffective assistance of counsel, as follows:

A. Defense counsel admitted without petitioner's knowledge or acquiescence that petitioner was guilty of something;

B. Defense counsel failed to sufficiently prepare for trial and failed to present adequate evidence of petitioner's mental deficiency and longstanding use of alcohol and drugs, and the defense of intoxication was ineffectively presented;

C. Defense counsel failed to advise petitioner of his right to testify so that the jury was unaware of petitioner's longstanding alcohol and drug use and at the time of the offense, as well as failing to raise or explore fetal alcohol syndrome;

D. Defense counsel failed to pursue or utilize expert testimony as to petitioner's impairment from alcohol or drugs;

E. Defense counsel failed to object to evidence of a robbery to support felony murder where the State did not have sufficient evidence to argue felony murder in its opening statement, and failed to have proper instructions on felony murder (robbery) given;

F. Defense counsel failed to pursue or present adequate evidence of petitioner's extreme or emotional disturbance, and the experts utilized failed to establish petitioner's inability to validly waive his rights and the level of alcohol impairment at both the guilt and

1346 (11th Cir. 2000) (raising different factual bases for claims of ineffective assistance of counsel), *cert. denied*, 121

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penalty phases of trial;

G. Defense counsel failed to object or move for a mistrial when the State's argument shifted the burden of proof as to the defenses of intoxication and mental impairment;

H. Defense counsel inadequately prepared for the penalty phase as he was not assisted by co-counsel, and the failure to have co-counsel appointed was a violation of due process;

I. Defense counsel was ineffective for arguing that the defense had never disputed petitioner's guilt and had never suggested that petitioner's co-defendant should be held to the same degree of accountability as petitioner;

J. Defense counsel failed to move for a mistrial upon the introduction of hearsay to support the robbery theory for felony murder, and the State's argument on felony murder without a limiting instruction violated due process;

K. Defense counsel failed to object and move for a mistrial, and direct appeal defense counsel failed to raise "these issues."

L. Direct appeal defense counsel failed to raise any issue as to the guilt phase of trial on appeal, including rulings on the motions to suppress and the constitutionality of Florida's death penalty;

M. Defense counsel failed to object or move for a mistrial wherein the State argued that the evidence was uncontroverted, thus commenting on petitioner's failure to testify;

N. Defense counsel ineffectively waived the suppression issues at trial;

2. Denial to an impartial jury; and

3. Florida's death penalty scheme is unconstitutional on its face and as applied.

Issues 1M, 1N, 2, 3, 4, and 5A-5F of the amended petition clearly were not raised in the pro se petition. Issue 5G in the amended petition, while similar to issue 3 in the pro se petition, presents a distinct legal basis for relief: that Florida's capital punishment scheme is unconstitutional versus that the trial court failed to permit evidence or allow argument on the underlying issue.

S.Ct. 1232 (2001); *see also United States v. Duffus*, 174 F.3d 333, 337 (3rd Cir.) (ineffective assistance of counsel for failing to raise an issue on appeal and for failing to object at sentencing to the sentencing guideline invoked versus failing to move to suppress evidence), *cert. denied*, 528 U.S. 866 (1999); *United States v. Pittman*, 209 F.3d 314, 317-318 (4th Cir. 2000) (lack of jurisdiction to enhance sentence, improper enhancement based on prior conviction, and insufficient proof that drug was crack cocaine versus ineffective assistance of appellate counsel and improper enhancement for obstruction of justice); *United States v. Craycraft*, 167 F.3d 451, 456 (8th Cir. 1999) (ineffective assistance for failing to file an appeal versus ineffective assistance premised upon failure to seek a downward departure or object to the type of drugs involved).

Based upon the foregoing, to permit petitioner the benefit of Rule 15(c)(2) is to create an exception to the statute of limitations not otherwise contemplated under the Rules of Civil Procedure or AEDPA. *See Harris v. Nelson*, 394 U.S. 286, 293-294, 295-298 (1969) (while "habeas corpus proceedings are characterized as 'civil' . . . . the label is gross and inexact," and holding that Rules 26 and 33 of the Federal Rules of Civil Procedure do not completely and automatically apply in habeas proceedings); *see also Fuller v. Marx*, 724 F.2d 717, 720 (8th Cir. 1984) ("The rule does not contemplate depriving defendants of the protection of the statute of limitations."). At the very least, then, Grounds 1M, 1N, 2, 3, 4, and 5A-5G of the amended petition are time-barred. *Compare Mederos v. United States*, 218 F.3d 1252, 1254 (11th Cir. 2000) (amended § 2255 motion raised identical claims as raised in pro se motion and thus relation back permitted).

Statement of Exhaustion

As discussed *supra*, at 15 n.6, Respondent does not waive this issue and respectfully requests the opportunity to address whether petitioner has complied with the exhaustion

requirement under 28 U.S.C. § 2254(b) in the event the Court were to conclude that the habeas petition is not time-barred.

Statement of Procedural Bar

As discussed *supra*, at 15 n.6, Respondent does not waive this issue and respectfully requests the opportunity to address whether petitioner has properly presented all of his federal claims before the state courts in the event the Court were to conclude that the habeas petition is not time-barred.

Statement of Noncognizability

As discussed *supra*, at 15 n.6, Respondent does not waive this issue and respectfully requests the opportunity to address whether petitioner's claims present federal constitutional grounds in the event the Court were to conclude that the habeas petition is not time-barred.

Statement of Merits

As discussed *supra*, at 15 n.6, Respondent does not waive this issue and respectfully requests the opportunity to address the merits of any exhausted, non-defaulted cognizable claims in the event the Court were to conclude that the habeas petition is not time-barred.

Conclusion

WHEREFORE, for the reasons herein stated, Respondent prays this Court dismiss the petition for writ of habeas corpus without further judicial proceedings.

Respectfully submitted,

CHARLES J. CRIST, JR.
Attorney General

/s/ Cassandra K. Dolgin
CASSANDRA K. DOLGIN
Assistant Attorney General

Florida Bar No. 0644390
Office of the Attorney General
State of Florida
The Capital
Tallahassee, FL 32399-1050
(850) 414-3579
(850) 487-0997 (fax)

Attorneys for Respondent

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been mailed, postage prepaid, this 12th day of January, 2004, to[9]:

Mary Catherine Bonner, Esq.
918 Lantana Ave.
Clearwater Beach, FL 33767

/s/ Cassandra K. Dolgin
CASSANDRA K. DOLGIN

[9] Undersigned counsel contacted counsel for petitioner who advised that she would be at the above-listed address until January 31, 2004, and thus the reason for service of the foregoing to that address rather than counsel's address listed in petitioner's pleadings, 207 S.W. 12th Court, Ft. Lauderdale, FL 33315-1522.

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

CASE NO. 3:03CV97-rh

GARY LAWRENCE,
Petitioner,

v.

JAMES V. CROSBY,
Respondent.

Petitioner's Motion in Opposition to the State's Order-to-show-cause Response And Motion for Equitable Relief

I.

Circuits disagree about whether the statute of limitations is tolled under §§ 2244(d) during the pendency of a certiorari petition, following the denial of post-conviction relief. Lawrence, who is nearly mentally retarded, filed a pro se Petition that would have been automatically accepted as timely in some jurisdictions—but not this one. The issue here isn't Lawrence's diligence but a statutory interpretation puzzle that challenges even great minds.

What should be Lawrence's penalty for guessing wrong?

Title *28 U.S.C. § 2244(d)(1)* provides a one-year period of limitations for people "in custody pursuant to the judgment of a State court" to file an application for a writ of habeas corpus. Title *28 U.S.C. § 2244(d)(2)* provides for tolling of this one-year period as follows:

> The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

Between January 1999 and November 2002, Lawrence sought post-conviction relief in Florida courts. The limitations period was clearly tolled during this time because Lawrence's state collateral relief motions were pending in the various state courts.[1] In *Carey*, the Court held that "until the application has achieved final resolution through the State's post-conviction procedures, by definition it remains 'pending'"[2] But it is not at all so clear whether the one-year statute of limitations applicable to federal habeas corpus petitions is also tolled during the period in which a petitioner may seek, and the United States Supreme Court considers, whether to grant, certiorari review of the denial of the petitioner's state collateral relief motion.

Respondent argues that the habeas petition at issue was filed four months after the statute of limitations expired. And although acknowledging the limitation period may be subject to equitable tolling, Respondent further argues that Lawrence did not act with sufficient diligence nor does there exist an exceptional circumstance beyond Lawrence's control that would support equitable relief here. To the contrary the Petition is timely and if this court is unpersuaded on this point, then equitable tolling is an appropriate remedy here.

There is disagreement among the courts of appeal on the question whether a petition for certiorari to the U.S. Supreme Court following the denial of state post-conviction relief tolls the limitations period. One position is that unlike the situation

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[1] *See Carey v. Saffold, 536 U.S. 214, 220, 153 L. Ed. 2d 260, 122 S. Ct. 2134 (2002).*

[2] *Id.*

with direct review, the tolling provision does not apply to the time when a petition for certiorari to the U.S. Supreme Court is pending or to the 90-day interval during which such a petition can be filed.

This counterintuitive interpretation was taken by the Eleventh Circuit in 2000, which wrote in a two page decision

> We agree with the Tenth and Fifth Circuits that the time during which a petition for writ of certiorari is pending, or could have been filed, following the denial of collateral relief in the state courts, is not to be subtracted from the running of time for *28 U.S.C. 2244(d)(1)* statute of limitations purposes.[3]

The argument is that time bar is justified by the statutory language and by the underlying purpose of the tolling provision. Section 2244(d)(1) includes the phrase "conclusion of direct review," a term that is it generally agreed includes review by the U.S. Supreme Court. By contrast, Section 2244(d)(2) provides for tolling during state collateral review only while the "State post-conviction or other collateral review . . . is pending." The argument goes that there is no textual basis for interpreting Section 2244(d)(2) to include a federal appeal of collateral issues because "pending" does not conjure up in some minds the specter of federal review with the same intensity as the phrase "conclusion of direct review." That is the argument against tolling in a nutshell.

Three years after the Eleventh Circuit gave us these reasons for not tolling, the Sixth Circuit, sitting en banc, reached the opposite conclusion. In that Court's view, the difference in language between subsections (d)(1) and (d)(2) doesn't matter. Instead, the court found the language of subsection (d)(2) resolves the situation conclusively. The court reasoned that the tolling provision requires that the application for state post-conviction relief be *pending*, not

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[3] *Coates v. Byrd*, 211 F.3d 1225, 1227.

that it be pending in *state court*. So while the petition for certiorari is pending before the U.S. Supreme Court, it satisfies the statutory requirement even though the state petition is no longer pending in state court.

In *Abela v. Martin*,[4] a lengthy and well-reasoned opinion, the court concluded that an application for state collateral review was "pending" for purposes of the tolling provision of § 2244(d)(2) regardless of whether it was being considered on appeal by a state court or by the United States Supreme Court on certiorari. The Court analyzed the word "pending" at length,

> While the *application* is one for *State* post-conviction relief, just as state criminal proceedings can raise federal issues reviewable in the United States Supreme Court, so can state habeas proceedings. A state criminal proceeding . . . is still "pending" even though the state courts are finished with it, until any petition filed is finally decided. Similarly, if there is a certiorari petition pending to review the validity of the state's denial of such an application for state post-conviction review, the *application* is still "pending"—that is, not finally decided. The application does not thereby stop being a state habeas proceeding or turn into a federal rather than a state application; it is just not finally decided yet.[5]

Positions contrary to tolling are premised on misapprehension of the statute. Chiefly, the Tenth Circuit felt and the Eleventh agreed that "A petition for writ of habeas corpus to the United States Supreme Court is not an application for state post-conviction review of any kind; it is neither an application for state post-conviction review nor an application

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[4] 348 F.3d 164 (6th Cir. 2003).

[5] *Abela* at 170 (citing with approval the reasoning of the dissent in *White v. Klizkie*, 282 F.3d 920, 927-927 (9th Cir. 2002)(Quotations omitted).

for other state collateral review." As the dissent pointed out in *White v. Klizkie*, "The United States Supreme Court . . . can consider state . . . cases when they raise federal issues. Otherwise, what is the United States Supreme Court hearing when it considers a state habeas petition on certiorari. Not an application for federal post-conviction or other collateral review."[6]

The court in *Abela* clarifies and corrects the Tenth and Eleventh circuits' misapprehension Supreme Court certiorari review of state collateral claims:

> The focus of section 2244(d)(2) is not on the court in which the application is pending but on the application itself. As long as the petition for certiorari involves an application for state court relief, section 2244(d)(2) requires that the statute of limitations be tolled. The court where the application is pending is irrelevant.[7]

Moreover, that the federal review process of a properly filed state application for state post-conviction or other collateral review is not itself a state application is patently irrelevant.

The Sixth Circuit further explained that to require a petitioner to file his petition seeking federal habeas corpus relief before he has sought certiorari to the Supreme Court does not promote the finality of state court determinations and encourages the simultaneous filing of two actions seeking essentially the same relief—thereby raising concerns about comity and exhaustion. The Sixth Circuit continued, "We doubt that Congress intended, in the Anti-Terrorism and Effective Death Penalty Act, to force prisoners to choose between federal habeas relief and seeking certiorari to the Supreme Court, or to do both simultaneously."[8]

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[6] 282 F.3d 920, 927-927 (9th Cir. 2002).

[7] *Abela* at 170.

[8] Abela at 171.

Wherefore we request on the strength and logic of this new reasoning, apparently yet to be considered by the Eleventh Circuit as an alternative to the unnecessarily restrictive reading of the statute found in *Coates*, that this Court reject Respondent's argument that Lawrence's Petition is untimely.

II.

The lack of clarity in the relevant law and plausibility of a Lawrence's legal theory are sufficient grounds for equitable tolling.

In the event that this Court is disinclined to accept the Petition as timely, Lawrence requests equitable tolling.

In *Fahy*, a case where the petition was thirty-five days late due to attorney error in interpreting debatable procedural provisions, the Third Circuit tolled the precise statute at issue here, applying equitable tolling in a capital case involving a petitioner convicted of murdering thirteen people.[9] The *Fahy* court reasoned that a court "must allow less than 'extraordinary' circumstances to trigger equitable tolling of the AEDPA's statute of limitations when a [capital] petitioner has been diligent in asserting his or her claims and rigid application of the statute would be unfair."[10]

There is no question that courts disagree about the tolling of the statute during federal review of collateral state claims. And not only is Lawrence's legal theory plausible, it is so sound and sensible that Lawrence's position is the law every-

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[9] *Fahy v. Horn, 240 F.3d 239, 245 (3d Cir. 2001) (cert. denied, 534 US. 944, 151 L. Ed. 2d 241, 122 S. Ct. 323 (2001); accord Banks v. Horn, 271 F.3d 527, 534-35 (3d Cir. 2001), rev'd on other grounds, 536 US. 266, 153 L. Ed. 2d 301, 122 S. Ct. 2147 (2002).*

[10] *Fahy, 240 F.3d at 245; see also Corjasso v. Ayers, 278 F.3d 874 (9th Cir. 2002)* (tolling AEDPA's statute of limitations despite a procedural defect and listing cases); *Lagrone v. Cockrell, 2002 U.S. Dist. LEXIS 15456, 2002 WL 1968246, at *8-9 (N.D. Tex. Aug. 19, 2002); De Jesus v. Miller, 215 F. Supp. 2d 410, 412 (S.D.N.Y. 2002).*

where that the Sixth Circuit Court of Appeals enjoys jurisdiction.[11]

III.

Additionally, Equitable tolling is an appropriate remedy here because (1) counsel who advised Lawrence of the timing of his Petition was selected by and pre-qualified the State of Florida under its registry statute (2) Lawrence is nearly retarded and could not meaningfully participate in an agency relationship with counsel in any event and (3) Lawrence who faces death has a facially strong constitutional claim.

The Respondent argues that Lawrence failed to show that he pursued his rights diligently and that the untimeliness of his petition is due to extraordinary circumstances beyond his control. Also, Respondent posits that a petitioner seeking equitable tolling cannot claim to have relied on erroneous advice of counsel, doubtless relying on reasoning that concludes there is an agency relationship between post-conviction counsel and the defendant that makes counsel's errors attributable to the defendant.

Counsel's possible misapprehension of the law with regard to the time frame for filing Lawrence's pro se motion for federal habeas relief cannot be litigated as a matter of ineffectiveness. Although Mr. Lawrence disagrees, the law has not been revisited under the AEDPA and continues to be that The [sic] law is clear: an action taken by an attorney who represents a capital defendant in post-conviction capital collateral proceedings may not be the basis for a claim of ineffective assistance of counsel. Lawrence also acknowledges that erroneous advice of counsel does not generally form the basis of a successful application for equitable

[11] *Abela v. Martin*, 348 F.3d 164 (6th Cir. 2003).

tolling.[12] But the law is equally clear with regard to the duty of the court in Florida where registry counsel has been assigned:

> The court *shall* monitor the performance of assigned counsel to ensure that the capital defendant is receiving quality representation. The court shall also receive and evaluate allegations that are made regarding the performance of assigned counsel. The Chief Financial Officer, the Department of Legal Affairs, the executive director, or any interested person may advise the court of any circumstance that could affect the quality of representation, including, but not limited to, false or fraudulent billing, misconduct, failure to meet continuing legal education requirements, solicitation to receive compensation from the capital defendant, or *failure to file appropriate motions in a timely manner.*[13]

The court failed to properly monitor counsel and Lawrence because of his low mental facility had no capacity himself to monitor or evaluate registry counsel. This circumstance—State selected counsel that did not receive adequate court supervision—is an extraordinary circumstance beyond Lawrence's control that caused his Petition to be filed in March 2003.

It is impossible to overstate the significance of Lawrence's limited intelligence to the resolution of the issue of whether equitable tolling is warranted here. Lawrence's trial counsel recognized that Lawrence is "very, very slow."[14] In fact, experts opined that Lawrence's full scale IQ is 81—the lowest part of the low average range; however all of his other scores did not match what would be expected of someone

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[12] *Helton v. Secretary for the Department of Corrections*, 259 F.3d 1310, 1313 (11th Cir. 2001).

[13] Florida Statutes section 27.711(12).

[14] TR 46, 56.

with an IQ of 81. He never achieved anything more than a person in the borderline retarded range. He reads like an 11-year-old although he is over 40; his writing skills fall slightly under those of a 9 year old; his factual knowledge is that of an 11 year old.[15] He left school in the Seventh grade yet was unable to read; his IQ placed him in the lowest fifth percentile of children—only four out of one hundred children would place lower than he. The IQ correlates with the inability to process ideas; to plan; to understand; to appreciate relationships and to understand what goes on in daily life.[16] These facts render it impossible to conclude that Lawrence could ever puzzle out the statute of limitations requirements on his own or even meaningfully participate in an agency relationship with his lawyer, especially one concerning the bewildering complexity of the habeas corpus rules.

On June 20, 2002, the United States Supreme Court held in *Atkins v. Virginia*[17] that execution of the mentally retarded constitutes cruel and unusual punishment prohibited by the Eighth Amendment to the Constitution. Among other reasons the Court's stated: "Mentally retarded defendants may be less able to give meaningful assistance to their counsel . . . Mentally retarded defendants in the aggregate face a special risk of wrongful execution."[18] For the purpose of this pleading the [sic] this Court need not reach the issue of whether Lawrence is constitutionally ineligible for the death penalty but only whether Lawrence's deficient intelligence is a persuasive factor in considering his application for equitable tolling. This pleading seeks extremely limited relief. It is not about whether the Lawrence's Petition should be granted but merely asks that he be given the opportunity to explore before

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[15] Penalty Phase Transcript, pp. 42, 45, 47, 48.

[16] Penalty Phase Transcript, pp. 78, 79.

[17] 122 S.Ct. 2242 (2002).

[18] *Atkins* at 2251.

a United States District Court compelling evidence demonstrating defects in his prosecution.

Equitable tolling is "'a discretionary doctrine that turns on the facts and circumstances of a particular case'" and, therefore, "'does not lend itself to bright-line rules.'"[19] Although some statutes of limitations "serve policy interests that would be adversely affected if the statutory limitations provisions were not strictly adhered to," the habeas context is different, warranting greater flexibility in the application of the AEDPA's statute of limitations.[20] So, in deciding the appropriateness of an equitable remedy to toll the statute of limitations, case law requires a court to consider the "facts and circumstances of a particular case."[21]

A facially strong constitutional claim which questions the fundamental fairness of the very process by which a petitioner was convicted and sentenced "compels review regardless of procedural defaults."[22] The strength of the claim matters. In this federal habeas petition, his first, Lawrence, a prisoner under sentence of death, seeks relief on the basis of evidence that defense counsel's argument at trial operated as the functional equivalent to a guilty plea—a strategy that Lawrence neither explicitly nor affirmatively agreed to or

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[19] *Harris v. Hutchison, 209 F.3d 325, 330* (4th Cir. 2000) (quoting *Fisher v. Johnson, 174 F.3d 710, 713 (5th Cir. 1999)).*

[20] *Harris at 329.*

[21] *Harris at 330.*

[22] *Murray v. Carrier, 477 US. 478, 501 n.8, 91 L. Ed. 2d 397, 106 S. Ct. 2639 (1986)* (Stevens, J., concurring); *see also Hensley v. Mun. Court, 411 U.S. 345, 349-50, 36 L. Ed. 2d 294, 93 S. Ct. 1571 (1973)* ("Habeas corpus is not a static, narrow, formalistic remedy, but one which must retain the ability to cut through barriers of form and procedural mazes. The very nature of the writ demands that it be administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected." (internal quotation marks and citations omitted)).

indeed even understood. This claim of ineffective assistance is but one of many claims raised by Lawrence. And this claim alone would support granting the Writ. *Rickman v. Bell*, 131 F.3d 1150 (6th Cir. 1997) (affirming 864 F. Supp. 686 (M.D. Tenn. 1994)), cert. denied, 523 U.S. 1133 (1998) (Prejudiced presume [sic] because counsel did not serve as advocate and showed contempt for his client such that he was a "second prosecutor" and defendant would have been "better off to have been merely denied counsel." Defense counsel presented the most damaging evidence in the case.) *United States v. Swanson*, 943 F.2d 1070 (9th Cir. 1991) (Prejudicial per se when trial counsel concedes that there is no reasonable doubt concerning the only factual issues in dispute during closing arguments.) *Nixon v. State*, 28 Fla. L. Weekly S 597 (July 10, 2003)(Prejudice presumed where counsel conceded guilt in capital trial with only "silent acquiescence" at most from the defendant. That court held that an affirmative, explicit consent was required.) *Harvey v. State*, ___ So.2d ___, 2003 WL 21511339 (Fla. July 3, 2003). (Prejudice presumed where counsel conceded guilt in capital trial. "([E]ven in cases involving a confession," counsel cannot concede guilt without the client's consent.)

Nothing in the statute at issue here prevents this court from granting the very limited relief sought in this pleading by man [sic] who faces the death penalty. Nor has the Respondent argued prejudice nor is there a public policy concern at issue here. To the contrary, the Supreme Court itself has, "'in the interests of justice'," been willing to overlook requirements that it would ordinarily impose in non-capital cases.[23] For example, the requirement that an argument be raised below and in the certiorari petition, ordinarily prerequisites for Supreme Court review, has been characterize [sic] by the

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[23] *Eddings v. Oklahoma, 455 US. 104, 117, 71 L. Ed. 2d 1, 102 S. Ct. 869* n.* (1982) (O'Connor, J., concurring) (quoting *Wood v. Georgia, 450 U.S. 261, 265 n.5, 67 L. Ed. 2d 220, 101 S. Ct. 1097 (1981)).*

Court as merely "technical[ ]." [24] And more than that the Supreme Court stated unequivocally that it is the duty of a reviewing court to exercise great care before allowing a capital petitioner's initial claim for federal habeas relief to be summarily dismissed.[25]

Finally, Respondent argues (1) that the burden of establishing equitable tolling rests with the petitioner and (2) that Lawrence "doesn't acknowledge that he is time-barred and thus fails to offer any basis for tolling the limitation period, thereby failing to meet his burden."[26] A petitioner is compelled by neither logic nor law to move for equitable tolling until (and unless) the Respondent raised the time-bar question. Because the statute of limitations is an affirmative defense that is subject to waiver, Lawrence had no reason to anticipate or assist the Respondent by suggesting that the Respondent might elect to raise this defense. See, e.g., *Robinson v. Johnson*, 313 F.3d 128, 137 (3rd Cir. Nov. 2002) (opinion on panel rehearing) (affirmative defenses such as the statute of limitations "under the AEDPA should be treated the same as affirmative defenses in other contexts, and, if not pleaded in the answer, they must be raised at the earliest practicable moment thereafter" or be deemed waived.), *cert denied*, 2003 WL 553518 (Oct. 6, 2003); *Stewart v. Hendricks*, 2003 WL 21675345 (3rd Cir. July 18, 2003) (unpublished) (state's failure to even mention the limitations defense in any pleading thereby waived the defense; the court is "not persuaded" by the state's references to other circuits' decisions approving district courts' raising of the limitations issue

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[24] *Id.*

[25] *Lonchar, 517 US. at 324* (noting in a capital case that "dismissal of a *first* federal habeas petition is a particularly serious matter, for that dismissal denies the petitioner the protections of the Great Writ entirely, risking injury to an important interest in human liberty" (emphasis in original) (citation omitted)).

[26] Response at 13.

sua sponte so long as the petitioner received notice and an opportunity to be heard.); *Scott v. Collins*, 286 F.3d 923 (6th Cir. 2002) (state's failure to raise issue of timeliness resulted in waiver of requirement under AEDPA that petition be filed within reasonable time after effective date of AEDPA); *Harwell v. Million*, 2003 WL 21801479 (6th Cir. Aug. 4, 2003) (unpublished) ("[w]here a district court dismisses a habeas corpus petition as time-barred, after the respondent has been ordered to file an answer and has so answered without asserting the statute of limitations defense, the district court's dismissal constitutes 'an impermissible curing of the respondent's waiver.'")

For all of these reasons, Lawrence asks this Court to reject Respondent's argument that the Petition is untimely or to permit the Petition by granting equitable tolling. In the lesser alternative, if this Court is disinclined to consider the substantive issues presented in this meritorious petition, Lawrence requests a certificate of appealability on the issue the Petition's timeliness.

WHEREFORE, Mr. Lawrence prays that the Writ issue.

Respectfully submitted,

MARY CATHERINE BONNER, ESQ.
Counsel for Mr. Lawrence
207 S.W. 12th Court
Ft. Lauderdale, Florida 33315-1522
Fl. Bar Number 283398
Tel: (954) 523-6225
Fax: (954) 763-8986

By:_____/s/_____
MARY CATHERINE BONNER, ESQ.

CERTIFICATE OF SERVICE

I HERFBY CERTIFY that a true and correct copy of the foregoing has been mailed, postage prepaid, this 30th day of March, 2004 to Assistant Attorney General Cassandra K. Dolgin, Office of the State Attorney, State of Florida, The Capital, Tallahassee, Florida 32399-1050.

By: /s/ _____
MARY CATHERINE BONNER, ESQ.

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

CASE NO. 3:03cv97-RH

GARY LAWRENCE,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

ORDER STAYING PROCEEDINGS

Petitioner was convicted of murder in Florida state court and sentenced to death. He seeks relief in this court by petition for writ of habeas corpus under 28 U.S.C. §2254. Respondent asserts the petition is barred by the one-year statute of limitations. *See* 28 U.S.C. §2244(d)(1). Whether that is so depends upon whether the one-year limitations period was tolled during the pendency of Petitioner's petition for writ of certiorari in the United States Supreme Court challenging the state court's denial of his motion for state collateral review. *See* 28 U.S.C. §2244(d)(2) ("The time during which a properly filed application for State post-conviction or other collateral review . . . is pending shall not be counted toward any period of limitation under this subsection.").

Petitioner asserts the petition should be deemed timely in accordance with the Sixth Circuit's decision in *Abela v. Martin*, 348 F.3d 164 (6th Cir. 2003) (en banc), *pet. for cert. filed sub nom. Caruso v. Abela*, 72 U.S.L.W. 3506 (Jan. 20, 2004) (No. 03-1079). Petitioner acknowledges, however, that the law in the Eleventh Circuit is to the contrary. *See Coates v. Byrd*, 211 F.3d 1225, 1227 (11th Cir. 2000); *accord Steed*

v. Head, 219 F.3d 1298, 1300 (11th Cir. 2000). Petitioner also invokes the doctrine of equitable tolling, but he plainly has not met the prerequisites to equitable tolling. *See, e.g., Diaz v. Sec'y for Dep't of Corr.*, ___ F.3d ___, 2004 WL 434631 (11th Cir. March 10, 2004) (reviewing case law and remarking that "extraordinary circumstances" are required for equitable tolling); *Steed*, 219 F.3d at 1300 (rejecting argument that "the limitations period is subject to equitable tolling because [Petitioner's] calculation of the statute of limitations depended on an interpretation of a novel legal issue and he was required to interpret Section 2244(d)(2) in the absence of 'clear law' and holding "an attorney's mis-calculation of the limitations period or mistake is not a basis for equitable tolling").

This court of course is bound to follow the law of the Eleventh Circuit. But a petition for writ of certiorari is pending in *Abela*. Consideration of the instant petition will be stayed pending the Supreme Court's ruling in *Abela*. If certiorari is denied or the Sixth Circuit's decision reversed, the instant petition will be dismissed as untimely. But if the Sixth Circuit's decision is affirmed, the instant petition will be considered on the merits.

For these reasons,

IT IS ORDERED:

All proceedings in this matter are stayed pending a final ruling by the United States Supreme Court in *Caruso v. Abela*, 72 U.S.L.W. 3506 (Jan. 20, 2004) (No. 03-1079).

SO ORDERED this 12th day of April, 2004.

/s/ Robert L. Hinkle
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

CASE NO. 3:03cv97-RH

GARY LAWRENCE,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

ORDER ON STATUS OF STAY

Petitioner was convicted of murder in Florida state court and sentenced to death. He seeks relief in this court by petition for writ of habeas corpus under 28 U.S.C. §2254. Respondent asserts the petition is barred by the one-year statute of limitations. *See* 28 U.S.C. §2244(d)(1).

Whether that is so depends upon whether the one-year limitations period was tolled during the pendency of Petitioner's petition for writ of certiorari in the United States Supreme Court challenging the state court's denial of his motion for state collateral review. *See* 28 U.S.C. §2244(d)(2) ("The time during which a properly filed application for State post-conviction or other collateral review . . . is pending shall not be counted toward any period of limitation under this subsection."). There is a circuit split on this issue. *Compare, e.g., Coates v. Byrd*, 211 F.3d 1225, 1227 (11th Cir. 2000), *with Abela v. Martin*, 348 F.3d 164 (6th Cir. 2003) (en banc), *cert. denied sub nom. Caruso v. Abela*, 72 U.S.L.W. 3506, 2004 WL 193884 (May 24, 2004) (No. 03-1079).

By Order Staying Proceedings entered April 13, 2004 (document 28), this action was stayed pending a final ruling by the United States Supreme Court in *Caruso v. Abela*, 72 U.S.L.W. 3506 (Jan. 20, 2004) (No. 03-1079), which presented this issue. Respondent's motion for reconsideration of the stay order was denied by order entered April 21, 2004. (Document 30.) Respondent filed a notice of appeal, and the appeal remains pending.

The Supreme Court now has denied certiorari in *Abela*. *See Caruso v. Abela*, 72 U.S.L.W. 3506, 2004 WL 193884 (May 24, 2004) (No. 03-1079). The case at bar thus is governed by the law of this circuit as set forth in *Coates v. Byrd*, 211 F.3d 1225, 1227 (11th Cir. 2000); *accord Steed v. Head*, 219 F.3d 1298, 1300 (11th Cir. 2000). Under that law, this action is barred by the one-year statute of limitations.[1]

As set forth in the Order Staying Proceedings, this petition will be dismissed in due course. Dismissal will be delayed, however, because of Respondent's notice of appeal. Although it is at least doubtful that the Order Staying Proceedings was an appealable order, Respondent's assertion of a right to an immediate appeal is perhaps not wholly frivolous.[2] But if

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[1] Petitioner also invokes the doctrine of equitable tolling, but, as noted in the Order Staying Proceedings entered April 13, 2004, Petitioner plainly has not met the prerequisites to equitable tolling. *See, e.g., Diaz v. Sec'y for Dep't of Corr.*, 362 F.3d 698, 700-01 (11th Cir. 2004) (reviewing case law and remarking that "extraordinary circumstances" are required for equitable tolling); *Steed*, 219 F.3d at 1300 (rejecting argument that "the limitations period is subject to equitable tolling because [Petitioner's] calculation of the statute of limitations depended on an interpretation of a novel legal issue and he was required to interpret Section 2244(d)(2) in the absence of 'clear law'" and holding "an attorney's miscalculation of the limitations period or mistake is not a basis for equitable tolling").

[2] Even so, why Respondent *wanted* to appeal is a puzzle. Under the Supreme Court's procedures, a decision to grant or deny certiorari in *Abela* was scheduled for this term—that is, by approximately the end of

Respondent's assertion of appellate jurisdiction is not frivolous, this court may lack jurisdiction to act on the issue of whether these proceedings should continue to be stayed, while that very issue is pending on appeal. Accordingly, no order will be entered vacating the stay or dismissing the petition until Respondent's appeal is dismissed or otherwise resolved.

For these reasons,

IT IS ORDERED:

The stay of proceedings entered by order dated April 13, 2004 (document 28) will remain in effect only for so long as Respondent's appeal of that order remains pending. When that appeal is dismissed or otherwise resolved, the stay will immediately be vacated, and judgment will be entered dismissing the petition.

SO ORDERED this 27th day of May, 2004.

/s/ Robert L. Hinkle
United States District Judge

June—and a decision on the merits of any appeal in the Eleventh Circuit could not possibly have been expected by then. If certiorari had been *granted* in *Abela*, a decision on the merits would not have come until next term, but if certiorari had been granted in *Abela*, any assertion that this court could not have stayed proceedings pending the Supreme Court's ruling on the merits would have had *no* chance of success.

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

CASE NO. 3:03cv97-RH

GARY LAWRENCE,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

ORDER FOR DISMISSAL

For the reasons set forth in the orders of April 13, 2004 (document 28), April 21, 2004 (document 30), and May 27, 2004 (document 34), and in light of the dismissal of respondent's attempted appeal, denial of the petition as untimely now is appropriate. Accordingly,

IT IS ORDERED:

The clerk shall enter judgment stating, "The petition for writ of habeas corpus is DENIED as untimely." Petitioner's motion for an extension of time (document 38) is DENIED as moot. The clerk shall close the file.

SO ORDERED this 16th day of September, 2004.

/s/ Robert L. Hinkle
Chief United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

CASE NO. 3:03CV97-rh

GARY LAWRENCE,

Petitioner,

v.

JAMES V. CROSBY,

Respondent.

REQUEST FOR CERTIFICATE OF APPEALABILITY

Mr. Lawrence has been sentenced to death. This Court has denied his Motion to Vacate because of timeliness.

After his conviction and the direct appeal of his sentence of death, a new post conviction counsel was appointed to represent him. His Florida post conviction litigation was conducted by a representative of the Registry of the Commission on Capital Cases through which the Legislature of Florida assured Mr. Lawrence of competent counsel.

Mr. Lawrence believed and was assured that his representation would continue into the federal courts. The Florida Registry statute provided for that continuity. That Registry counsel represented Mr. Lawrence through the Florida collateral process. Florida trial and appellate courts ruled against Mr. Lawrence and the next step in the process would have been a timely filed Motion to Vacate pursuant to Title 28 USC § 2254.

His appointed Registry counsel chose not to proceed before this Court. He then expended effort to attempt to locate a lawyer who would continue with the litigation process. He sought assistance to locate an attorney but was unsuccessful.

Ultimately, Mr. Lawrence filed a *pro se* motion.

Undersigned counsel asked this Court for appointment to represent Mr. Lawrence, with Mr. Lawrence's assent. Before this Court, Mr. Lawrence filed a supplemental Memorandum of Law, through undersigned counsel, which raised issues of substantial Constitutional importance which prejudiced Mr. Lawrence.

The State responded addressing only timeliness. Mr. Lawrence replied thereto and this Court *sua sponte* stayed the matter pending resolution of matters before the United States Supreme Court which would impact on this Court's decision making.

The State asked this Court to reconsider and this Court indicated that, depending on the outcome of certain pending matters, it would rule substantively only after those matters were concluded. The State appealed the Stay Order; Mr. Lawrence moved to strike the appeal. His hope was to address timeliness in depth before this Court. That appeal by the State was ultimately dismissed by the United States Court of Appeals for the Eleventh Circuit.

Before this Court's final ruling, undersigned counsel sought a short continuance in order to review the totality of the matter and if necessary to present facts to this Court. The Order dismissing the petition due to untimely filing and the Order denying the continuance were entered simultaneously.

Mr. Lawrence filed his Notice of Appeal and now asks this Court to grant him a Certificate of Appealability in order that he may litigate both the substantive issues presented, the denial of a hearing thereon and the dismissal for timeliness.

This matter of the gravest concern, it is respectfully submitted, should not be barred because of the failure of an unrepresented, virtually retarded defendant to timely raise issues before this Court.

WHEREFORE, Mr. Lawrence asks that this Court grant him a certificate of appealability.

Respectfully submitted,

MARY CATHERINE BONNER, ESQ.
Counsel for Mr. Lawrence
207 S.W. 12th Court
Ft. Lauderdale, Florida 33315-1522
Fl. Bar Number 283398
Tel: (954) 523-6225
Fax: (954) 763-8986

By: ___ /s/ _____
MARY CATHERINE BONNER, ESQ.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed, postage prepaid, this 11th day of November, 2004 to Assistant Attorney General Cassandra K. Dolgin, Office of the State Attorney, State of Florida, The Capital, Tallahassee, Florida 32399-1050.

By: ___ /s/ _____

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

Case No. 3:03CV97-rh
CAPITAL CASE

GARY LAWRENCE,

Petitioner,

v.

JAMES V. CROSBY,

Respondent.

SUGGESTIONS IN OPPOSITION TO PETITIONER'S "REQUEST FOR CERTIFICATE OF APPEALABILITY"

Comes now Respondent, by and through counsel, and in opposition to petitioner's "Request For Certificate Of Appealability" (Doc. No. 45) (hereinafter "Request"), states as follows:

1. Background

A. On March 11, 2003, petitioner filed his pro se petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Doc. No. 1. Thereafter, through counsel, petitioner filed an amended petition on September 8, 2003. Doc. No. 12.

B. Respondent filed its "Response To Order To Show Cause Why A Writ Of Habeas Corpus Should Not Be Granted" on January 12, 2004, asserting that petitioner was time-barred pursuant to 28 U.S.C. § 2244(d) from obtaining federal habeas relief. Doc. No. 19.

C. Petitioner, on March 30, 2004, filed his reply to the State's response, opposing the dismissal of his petition. Doc. No. 26

D. Following litigation concerning a stay issued in the case, this Court issued its Order filed September 16, 2004 dismissing the petition as untimely. Doc. No. 39. Judgment was entered on September 20, 2004. Doc. No. 40. The dismissal order relied upon Orders dated April 13, 2004 (Doc. No. 28), April 21, 2004 (Doc. No. 30), and May 27, 2004 (Doc. No. 34). Doc. No. 39, at 1.

E. Petitioner filed his notice of appeal on October 15, 2004, Doc. No. 41, and now seeks a certificate of appealability. Doc. No. 45.

2. Standard

A. A certificate of appealability may issue only "if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2).

B. Under *Barefoot v. Estelle*, 463 U.S. 880 (1983), a substantial showing of a denial of a federal right required "more than the absence of frivolity and that the standard is a higher one than the 'good faith' requirement of § 1915," *id.* at 893, and § 2253(c) "requires an appealing petitioner to demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further." *Henry v. Department of Corrections*, 197 F.3d 1361, 1364 (11th Cir. 1999) (internal quotation marks and citations omitted).

C. "Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also Tennard v. Dretke*, 124 S.Ct. 2562, 2569 (2004).

D. When the district court denies a habeas petition on procedural

> grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.

Slack, 529 U.S. at 484.

3. Discussion

A. Petitioner seeks a certificate of appealability "in order that he may litigate both the substantive issues presented, the denial of a hearing thereon and the dismissal for timeliness." Request, at 3.

B. Because this Court did not address the substantive issues or whether petitioner was entitled to an evidentiary hearing on those claims, a certificate of appealability is inappropriate thereupon for appellate consideration in the first instance. *See Slack*, 529 U.S. at 484 (setting forth the standard for granting a certificate of appealability upon denial of a habeas petition on procedural grounds without disposition of the underlying constitutional claims); *Gonzalez v. Secretary for the Department of Corrections*, 366 F.3d 1253, 1265 (11th Cir. 2004) (discussing *Slack* standard), *pet. for cert. filed* (2004). Petitioner cites no authority and it is generally not the function of the federal appellate court to sit as a trial court and consider claims in the first instance—i.e., those not first decided by the district court. *Singleton v. Wulff*, 428 U.S. 106, 120 (1976) ("It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below."); *see e.g., Johnson v. Florida*, 348 F.3d 1334, 1354 (11th Cir. 2003); *Torres v. Pittston Co.*, 346 F.3d 1324, 1334 (11th Cir. 2003); *Jackson v. Dugger*, 931 F.2d 712 (11th

Cir.), *cert. denied*, 502 U.S. 973 (1991); *Sofarelli v. Pinellas County*, 931 F.2d 718, 724 (11th Cir. 1991); *see also Drew v. Department of Corrections*, 297 F.3d 1278 (11th Cir. 2002) (reviewing timeliness issue under 28 U.S.C. § 2244(d) only); *Steed v. Head*, 219 F.3d 1298 (11th Cir. 2000) (same).

C. In respect to his request for a certificate of appealability as to the timeliness issue, petitioner reasserts factors that he relied upon in opposing Respondent's motion that the petition be dismissed as untimely filed. *Compare* Request, at 2 *with* "Petitioner's Motion in Opposition to the State's Order-to-show-cause Response And Motion for Equitable Tolling" (Doc. No. 26, at 9-11).

D. First, any actions on the part of counsel is not a basis for equitable tolling. *Helton v. Secretary for the Dept. of Corrections*, 259 F.3d 1310, 1313 (11th Cir. 2001), *cert. denied*, 535 U.S. 1080 (2002); *Sandvik v. United States*, 177 F.3d 1269, 1271-1272 (11th Cir. 1999); *see also* 28 U.S.C. § 2254(i). Petitioner makes no attempt to demonstrate that reasonable jurists would find it debatable that this Court's assessment of the procedural issue was wrong.

E. In seeking a certificate of appealability petitioner also seems to rely upon his assertion that he is "virtually retarded." Request, at 3. Notwithstanding, petitioner ignores the fact that he was quite capable of and did in fact file a habeas petition, albeit untimely. That counsel representing petitioner in state court either did not file the petition or failed to advise petitioner of when it was due is insufficient to establish equitable tolling, as discussed *supra*. Petitioner has failed to meet his burden in respect to the requisite standard under 28 U.S.C. § 2253(c)(2).

F. Finally, the fact that this is a capital case does not call for a different standard for evaluating the application of 28 U.S.C. §2244(d). *See Kreutzer v. Bowersox*, 231 F.3d 460 (8th Cir. 2000). Once again, petitioner makes no attempt

to demonstrate that reasonable jurists would find it debatable that this Court's assessment of the procedural issue was wrong.

4. Conclusion

Having failed to meet the requisite standard under 28 U.S.C. § 2253(c)(2), petitioner is not entitled to a certificate of appealability.

WHEREFORE, for the reasons herein stated, Respondent prays this Court for its order denying petitioner's request for a certificate of appealability.

Respectfully submitted,

CHARLES J. CRIST, JR.
Attorney General

/s/ Cassandra K. Dolgin
CASSANDRA K. DOLGIN
Assistant Attorney General
Florida Bar No. 0644390

Office of the Attorney General
State of Florida
The Capital
Tallahassee, FL 32399-1050
(850) 414-3579
(850) 487-0997 (fax)

Attorneys for Respondent

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been mailed, postage prepaid, this 12th day of November, 2004, to:

Mary Catherine Bonner, Esq.
207 S.W. 12th Court
Ft. Lauderdale, FL 33315-1522

/s/ Cassandra K. Dolgin
CASSANDRA K DOLGIN

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

CASE NO. 3:03cv97-RH

GARY LAWRENCE,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

ORDER GRANTING CERTIFICATE
OF APPEALABILITY

Final judgment has been entered denying this petition for writ of habeas corpus under 28 U.S.C. §2254. Petitioner has filed a timely notice of appeal. Under 28 U.S.C. §2253(c)(1), however, petitioner may not appeal unless a certificate of appealability is issued. Under *Edwards v. United States*, 114 F.3d 1083 (11th Cir. 1997), petitioner's notice of appeal is deemed an application for a certificate of appealability. Petitioner also has filed separate motions for a certificate of appealability, for appointment of counsel for appeal, and for leave to proceed on appeal in forma pauperis. Respondent has filed a memorandum in opposition.

A certificate of appealability may be issued only if petitioner "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. §2253(c)(2). *See Miller-El v. Cockrell*, 537 U.S. 322, 336, 123 S. Ct. 1029, 1039-40, 154 L. Ed. 2d 931 (2003) (explaining meaning of this term); *Slack v. McDaniel*, 529 U.S. 473, 483-84, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000) (same); *Barefoot v. Estelle*, 463 U.S. 880,

893 n.4, 103 S. Ct. 3383, 77 L. Ed. 2d 1090 (1983); *see also Williams v. Taylor*, 529 U.S. 362, 402-13, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000) (setting forth standards applicable to §2254 petitions on the merits). As the Court said in *Slack*:

> To obtain a COA under § 2253(c), a habeas prisoner must make a substantial showing of the denial of a constitutional right, a demonstration that, under *Barefoot*, includes showing that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were "'adequate to deserve encouragement to proceed further.'"

Slack, 529 U.S. at 483-84, *quoting Barefoot*, 463 U.S. at 893 n.4. Further, in order to obtain a certificate of appealability when dismissal is based on procedural grounds, a petitioner must show, "at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack*, 529 U.S. at 484.

In the case at bar, the petition was denied as untimely. The dispositive issue is whether the one-year limitations period applicable to a petition for writ of habeas corpus under 28 U.S.C. §2254 is tolled during the pendency of a petition for writ of certiorari in the United States Supreme Court challenging the state court's denial of petitioner's earlier motion for state collateral review. *See* 28 U.S.C. §2244(d)(2) ("The time during which a properly filed application for State post-conviction or other collateral review . . . is pending shall not be counted toward any period of limitation under this subsection."). There is a circuit split on this issue. *Compare, e.g., Coates v. Byrd*, 211 F.3d 1225, 1227 (11th Cir. 2000), *and Steed v. Head, 219 F.3d 1298*, 1300 (11th Cir. 2000), *with Abela v. Martin*, 348 F.3d 164 (6th Cir. 2003) (en banc),

cert. denied sub nom. Caruso v. Abela, 72 U.S.L.W. 3506, 2004 WL 193884 (May 24, 2004) (No. 03-1079).

Jurists of reason could not debate whether this issue is settled at the panel level in the Eleventh Circuit; under *Coates* and *Steed*, the issue is settled. But jurists of reason could find it debatable whether the Eleventh Circuit view, as set forth in *Coates* and *Steed*, or the Sixth Circuit view, as set forth in *Abela*, ultimately is correct. A certificate of appealability properly should be issued so that petitioner can pursue the possibility of en banc or Supreme Court review of this issue. Petitioner also asserts equitable tolling, an issue that appropriately may be addressed in conjunction with the legal issue that is the subject of the circuit split.

For the same reasons, I find that petitioner's appeal is taken in good faith, and that he therefore should be allowed to proceed in forma pauperis on appeal.

Accordingly,

IT IS ORDERED:

1. Petitioner's notice of appeal (document 10), treated as an application for a certificate of appealability, and petitioner's motion for issuance of a certificate of appealability (document 45), are GRANTED.

2. A certificate of appealability is hereby issued on the question whether the one-year limitations period applicable to a petition for writ of habeas corpus under 28 U.S.C. §2254 barred this petition, and on the legal issue whether the statute of limitations is tolled during the pendency of a petition for writ of certiorari in the United States Supreme Court challenging the state court's denial of petitioner's earlier motion for state collateral review. *See* 28 U.S.C. §2244(d)(2) ("The time during which a properly filed application for State post-conviction or other collateral review . . . is pending shall not be counted toward any period of limitation under this

subsection."); *compare, e.g., Coates v. Byrd*, 211 F.3d 1225, 1227 (11th Cir. 2000), *and Steed v. Head*, 219 F.3d 1298, 1300 (11th Cir. 2000), *with Abela v. Martin*, 348 F.3d 164 (6th Cir. 2003) (en banc), *cert. denied sub nom. Caruso v. Abela*, 72 U.S.L.W. 3506, 2004 WL 193884 (May 24, 2004) (No. 03-1079).

3. Petitioner's motion for appointment of counsel (document 46) is GRANTED. The appointment of Mary Catherine Bonner as attorney for petitioner is continued for purposes of appeal.

4. Petitioner's motion for leave to proceed on appeal in forma pauperis (document 47) is GRANTED.

SO ORDERED this 15th day of November, 2004.

/s/ Robert L. Hinkle
Chief United States District Judge

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 04-15435

GARY LAWRENCE,
Petitioner-Appellant,

v.

STATE OF FLORIDA,
Respondent-Appellee.

Aug. 26, 2005

Appeal from the United States District Court
for the Northern District of Florida

Before DUBINA, BLACK and CARNES, *Circuit Judges.*

DUBINA, *Circuit Judge*:

This is a death penalty case in which the Certificate of Appealability ("COA") presents only one issue for our review: whether the one-year limitations period of the Antiterrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. § 2244(d)(1), bars petitioner Gary Lawrence's habeas petition. After reviewing the record, reading the parties' briefs, and having the benefit of oral argument, we agree with the district court that Lawrence's petition was untimely. Accordingly, we affirm the district court's order.

BACKGROUND

In March 1995, a Florida jury convicted Lawrence of one count each of premeditated murder in the first degree, conspiracy to commit murder, petit theft, and grand theft of a

motor vehicle. The jury recommended a death sentence based on the murder conviction, and the trial court followed the jury's recommendation and imposed a death sentence. The Florida Supreme Court summarized the facts of the murder as follows:

> Shortly after Gary and Brenda Lawrence were married, they separated, and another man, Michael Finken, moved in with Brenda and her two daughters, Stephanie and Kimberly Pitts, and Stephanie's friend, Rachel Matin. On the day of the murder, July 28, 1994, Gary and Michael drove Brenda to work and then drank beer at a friend's house. Later, Gary and Michael picked Brenda up and the three returned to the friend's house where they drank more beer. After the three returned to Brenda's apartment, Gary and Michael argued and Gary hit Michael when he learned that Michael had been sleeping with Brenda. Gary and Michael seemed to resolve their differences, and Michael fell asleep on the couch. Gary and Brenda conversed, and Brenda went through the house collecting weapons—including a pipe and a baseball bat. Gary and Brenda told Kimberly and Rachel that they were "going to knock off Mike." Gary told Kimberly to "stay in your bedroom no matter what you hear."

The trial court described what happened after Gary and Brenda spoke to the girls:

> Thereafter, the two girls heard what they described as a pounding sound. At one point, Rachel Matin stated that she heard the victim say, "stop it, if you stop, I'll leave." She stated that she heard that statement several times. Kimberly Pitts stated she heard the victim say, "please don't hit me, I'm already bleeding." The victim's pleas, however, were met with more pounding. Once the pounding stopped, the girls were required to assist in the clean up and described to the jury what they observed.

Kimberly stated that much of the victim's right side of his face was missing and his chin was knocked over to his ear. Rachel Matin stated that there was no skin left on the victim's face and part of his nose was missing. Apparently the victim was still alive. Kimberly observed her mother coming out of the kitchen area with what appeared to be a dagger and then, although not seeing the dagger in her hand at the time, observed her mother make a stabbing motion toward the victim with something in her hand.

It was at that time when Brenda Lawrence requested that the girls obtain the assistance of Chris Wetherbee. Upon his entrance into the home, Chris Wetherbee observed the victim's head being caved in, blood all over, the victim's eyeball protruding approximately three inches and a mop handle shoved into the victim's throat. Wetherbee asked Gary Lawrence, "what's going on?" At which time the Defendant responded by pulling out the mop handle and kicking the victim and making the statement "this is what's going on." Immediately after removing the mop handle from the victim's throat, Wetherbee heard the victim give approximately three or four ragged breaths at which time the victim thereafter stopped breathing and apparently expired. The Defendant, Gary Lawrence, told Wetherbee that he had beat him with a pipe until it bent and then beat him with a baseball bat.

Chris Wetherbee summarized the victim's state: "And [he] looked like something off of one of the real good horror movies." Gary and Brenda then removed a small amount of money from Michael's pockets, wrapped the body in a shower curtain and placed the body in Michael's car, and Gary drove to a secluded area where

> he set the body afire. When Gary returned home, he and Brenda danced.

Lawrence v. State, 698 So.2d 1219, 1220 (Fla.1997).

The Florida Supreme Court affirmed Lawrence's conviction and sentence. *Id.* The United States Supreme Court denied certiorari review on January 20, 1998. *Lawrence v. Florida*, 522 U.S. 1080, 118 S.Ct. 863, 139 L.Ed.2d 761 (1998). Lawrence sought state post-conviction relief, and the trial court denied the petition on October 11, 2000. The Florida Supreme Court affirmed the trial court's denial of state post-conviction relief. *Lawrence v. State*, 831 So.2d 121 (Fla.2002). The United States Supreme Court denied certiorari review of the Florida Supreme Court's denial of post-conviction relief. *Lawrence v. Florida*, 538 U.S. 926, 123 S.Ct. 1575, 155 L.Ed.2d 319 (2003).

Lawrence then moved to federal court seeking habeas relief pursuant to 28 U.S.C. § 2254. The filing of his March 11, 2003, federal pro se petition sparked an unusual procedural journey. After filing an amended habeas petition, the State responded that the district court should dismiss the petition because Lawrence was time-barred from obtaining federal habeas relief on either the original petition or the amended petition. The State also argued that equitable tolling should not apply in Lawrence's case. Lawrence opposed the dismissal on the basis that there was a disagreement among the courts of appeal on the question whether a petition for certiorari to the U.S. Supreme Court following the denial of state post-conviction relief tolls the limitation period. Lawrence sought to invoke the doctrine of equitable tolling on the grounds that it was appropriate because (1) counsel who advised him of the timing of his petition was selected by and pre-qualified by the State of Florida under its registry statute; (2) his mental abilities prevented him from meaningfully participating in a relationship with his counsel; and (3) he had a facially strong constitutional claim.

On April 12, 2004, the district court entered an order staying the proceedings. The court determined that whether Lawrence's petition was time-barred "depends upon whether the one-year limitations period was tolled during the pendency of Petitioner's petition for writ of certiorari in the United States Supreme Court challenging the state court's denial of his motion for state collateral review." [Dist. Ct. Order 28 at 1-2]. The court noted that there was a circuit split on the issue, although Eleventh Circuit precedent clearly stated that the limitations period was not tolled during the pendency of a petition for certiorari challenging the state court's denial of post-conviction relief. *See Coates v. Byrd*, 211 F.3d 1225, 1227 (11th Cir.2000). On the question of equitable tolling, the district court found that Lawrence had not met the prerequisites to equitable tolling. However, in light of the pending certiorari petition in *Abela v. Martin*, 348 F.3d 164 (6th Cir.2003), *cert. denied sub nom*, *Caruso v. Abela*, 541 U.S. 1070, 124 S.Ct. 2388, 158 L.Ed.2d 976 (2004), which held contrary to this circuit's decision in *Coates*, 211 F.3d at 1227, the district court entered an order staying the proceedings. The district court noted that if the Supreme Court denied review in *Abela*, then it would dismiss Lawrence's petition based on *Coates*. [Dist. Ct. Order 28 at 1-2].

Subsequently, on May 27, 2004, after the Supreme Court denied review in *Caruso v. Abela*, the district court noted in an order that Lawrence's petition was time-barred based on *Coates*. [Dist. Ct. Order 34 at 2]. However, the court did not enter an order dismissing the petition because the State had lodged an appeal from the district court's stay order. After this court dismissed the State's appeal from the stay order for lack of jurisdiction, the district court entered the order dismissing the petition. Lawrence filed a motion for a COA, which the district court granted. The district court set forth the issue in the COA as "whether the one-year limitations period applicable to a petition for writ of habeas corpus under

28 U.S.C. § 2254 barred this petition, and on the legal issue whether the statute of limitations is tolled during the pendency of a petition for writ of certiorari in the United States Supreme Court challenging the state court's denial of petitioner's earlier motion for state collateral review." [Dist. Ct. Order 45, at 4].

DISCUSSION

The only issue presented in the COA is whether the one-year limitations period under AEDPA bars Lawrence's habeas petition. After needless delay, the district court determined that Lawrence's petition was untimely.[1] "The district court's interpretation and application of a statute of limitations is a question of law that is subject to de novo review." *Hepburn v. Moore*, 215 F.3d 1208, 1209 (11th Cir.2000). We also review de novo the district court's legal decision on equitable tolling. *Drew v. Dep't of Corr.*, 297 F.3d 1278, 1283 (11th Cir.2002); *Steed v. Head*, 219 F.3d 1298, 1300 (11th Cir.2000). However, we will reverse the district court's factual determinations only if they are clearly erroneous. *Drew*, 297 F.3d at 1283. The district court's finding whether a party was diligent in ascertaining the federal habeas filing deadline is a finding of fact. *See id.* at 1287, 1287 n. 2 (stating that "[t]reating a finding regarding diligence as a finding of fact is consistent with the approach taken by the majority of the circuits in both habeas corpus proceedings and other contexts").

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[1] We say needless delay because we conclude that the district court abused its discretion in entering a stay order pending a certiorari ruling by the United States Supreme Court in *Caruso v. Abela*, 541 U.S. 1070, 124 S.Ct. 2388, 158 L.Ed.2d 976 (2004). The stay injured the State because the State has a substantial interest in the finality of state criminal proceedings. *See McCleskey v. Zant*, 499 U.S. 467, 493, 111 S.Ct. 1454, 1470, 113 L.Ed.2d 517 (1991). "Each delay, for its span, is a commutation of a death sentence to one of imprisonment." *Thompson v. Wainwright*, 714 F.2d 1495, 1506 (11th Cir.1983).

We begin our discussion by setting forth the limited circumstance under which a court may issue a COA. The right to appeal is governed by the COA requirements set forth in 28 U.S.C. § 2253(c):

> *(c)(1)* Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—
>
> *(A)* the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
>
> *(B)* the final order in a proceeding under section 2255.
>
> *(2)* A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.
>
> *(3)* The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

28 U.S.C. § 2253(c).

Under this limited provision, if a district court denies a habeas petition on procedural grounds without reaching the petitioner's underlying constitutional claims, a COA should issue only if the petitioner shows "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right, and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 478, 120 S.Ct. 1595, 1601, 146 L.Ed.2d 542 (2000). "[B]oth showings [must] be made before the court of appeals may entertain the appeal." *Id.* at 485, 120 S.Ct. at 1604. If the procedural bar is obvious and the district court correctly invoked it to dispose of the case, "a reasonable jurist could not conclude either that the district court erred in dismissing

the petition or that the petitioner should be allowed to proceed further." *Id.* at 484, 120 S.Ct. at 1604. The court may first resolve the issue whose answer is more apparent from the record and the arguments. *Id.* at 485, 120 S.Ct. at 1604. "The recognition that the court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of, allows and encourages the court to first resolve procedural issues." *Id.* (quotations and citation omitted).

Because of the statutory constraint in issuing a COA, we are puzzled by the district court's issuance of a COA in this case. The district court should not have issued a COA on the statute of limitations issue because binding circuit precedent clearly disposed of the issue. "[T]he time during which a petition for writ of certiorari is pending, or could have been filed, following the denial of collateral relief in the state courts, is not to be subtracted from the running of time for 28 U.S.C. § 2244(d)(1) statute of limitations purposes." *Coates*, 211 F.3d at 1227. On that basis, jurists of reason would not find the timeliness issue debatable in this circuit. Thus, a COA should not have issued.

However, the district court did issue a COA on the statute of limitations issue. Although the COA does not specifically state that the exceptions to the statute of limitations—State impediment and equitable tolling—are included within the COA, Lawrence contends that these exceptions are subsumed within the COA and properly before this court for consideration. We agree. To decide whether the statute of limitations bars Lawrence's federal habeas petition, we must consider whether a State impediment or equitable tolling excepts the one-year filing deadline. If Lawrence can demonstrate that a State impediment prevented him from timely filing or that equitable tolling applies to his case, then his petition is timely.

Lawrence contends that 28 U.S.C. § 2244(d)(1)(B)[2] applies to his case because the State caused an impediment to his timely filing by providing him with an incompetent attorney through the Florida counsel registry system. It is not clear, however, that Lawrence asserted a § 2244(d)(1)(B) impediment to the district court. We generally do not consider an issue that was not raised in the district court. *Calsadilla v. Banco Latino Int'l*, 413 F.3d 1285, 1287 (11th Cir.2005); *Rhine v. Boone*, 182 F.3d 1153, 1154 (10th Cir.1999) (refusing to consider § 2244(d)(1)(B) argument because petitioner did not argue in district court that State had created an impediment to his filing in violation of the Constitution). Assuming Lawrence presented this issue to the district court, we conclude that Lawrence's assertion that the State impeded him from timely filing by providing an incompetent attorney to assist him after setting up a State registry system to monitor attorney performance, is meritless. This is not the type of State impediment envisioned in § 2244(d)(1)(B).

Additionally, Lawrence cannot show that there are extraordinary circumstances present in his case to warrant the application of equitable tolling. "Equitable tolling is an extraordinary remedy which is typically applied sparingly." *Steed*, 219 F.3d at 1300. It is available "when a movant untimely files because of extraordinary circumstances that are both beyond his control and unavoidable even with diligence." *Sandvik v. United States*, 177 F.3d 1269, 1271 (11th Cir.1999). Equitable tolling is limited to rare and exceptional circumstances, such as when the State's conduct prevents the petitioner from timely filing. *Gibson v. Klinger*, 232 F.3d 799, 808 (10th Cir.2000); *see also Irwin v. Dep't of Veterans*

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[2] This provision states that the one-year limitation period shall begin to run on "the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action." 28 U.S.C. § 2244(d)(1)(B).

Affairs, 498 U.S. 89, 96, 111 S.Ct. 453, 458, 112 L.Ed.2d 435 (1990) (stating that the Court has allowed equitable tolling in situations where complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass); *Arce v. Garcia*, 400 F.3d 1340, 1349 (11th Cir.2005) (noting that in order to invoke equitable tolling, courts usually require some affirmative misconduct, such as deliberate concealment).

Making the most of a novel argument, Lawrence posits that the State's provision to him of an incompetent attorney justifies the imposition of equitable tolling. This is not an extraordinary circumstance that warrants the application of equitable tolling. Moreover, we have stated on numerous occasions that "attorney negligence is not a basis for equitable tolling, especially when the petitioner cannot establish his own diligence in ascertaining the federal habeas filing deadline." *Howell v. Crosby*, 415 F.3d 1250, 1250 (11th Cir.2005); *accord Helton v. Secretary for the Dep't of Corr.*, 259 F.3d 1310, 1313 (11th Cir.2001); *Steed*, 219 F.3d at 1300; *Sandvik*, 177 F.3d at 1270.

Lawrence also contends that his mental incapacity prevented him from timely filing and justifies the invocation of equitable tolling. However, Lawrence cannot establish a causal connection between his alleged mental incapacity and his ability to file a timely petition. Lawrence admits in his appellate brief that medical reports state that his full scale IQ is 81, and he admits that he did not make the assertion that he was mentally incompetent per se. Instead, Lawrence claims that his initial pleading made it clear that he has suffered from mental impairments his entire life. However, this contention, without more, is insufficient to justify equitable tolling. *See Bilbrey v. Douglas*, 124 Fed.Appx. 971, 973 (6th Cir.2005) (finding that equitable tolling did not apply because petitioner "failed to establish a causal connection between her mental condition and her ability to file a timely petition"); *Green v.*

Hinsley, 116 Fed.Appx. 749, 751 (7th Cir.2004) (finding that equitable tolling did not apply because petitioner failed to submit evidence of how his low IQ would render him incompetent or prevent him from timely filing his petition); *Fisher v. Gibson*, 262 F.3d 1135, 1145 (10th Cir.2001) (finding that petitioner's mere allegations of incompetency at the time of his guilty pleas did not suffice to warrant equitable tolling of the limitations period); *Collins v. Scurr*, 230 F.3d 1362 (8th Cir.2000) (Table) (finding that bald and unsupported assertions that relate to an instance of alleged mental incompetency that occurred at a time remote to petitioner's habeas petition filing deadline did not equitably toll the statute of limitations); *Fisher v. Johnson*, 174 F.3d 710, 716 (5th Cir.1999) (finding that equitable tolling did not apply when petitioner's brief period of incapacity "occurred at a time so remote to his deadline" and petitioner could not show that he diligently pursued his application the remainder of the one-year filing deadline); *cf. Laws v. Lamarque*, 351 F.3d 919, 923 (9th Cir.2003) (remanding case for further factual development on issue of whether petitioner's mental illness prevented him from timely filing his federal habeas petition as to warrant the application of equitable tolling); *Nara v. Frank*, 264 F.3d 310, 320 (3d Cir.2001) (remanding case for further factual development where petitioner "presented evidence of ongoing, if not consecutive, periods of mental incompetency" because mental incompetence may constitute an extraordinary circumstance for purposes of tolling the statute of limitations when a person's mental deficiency affects his ability to file a timely habeas petition).

CONCLUSION

For the above stated reasons, we affirm the district court's order dismissing Lawrence's habeas petition as untimely.

AFFIRMED.